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In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

COLIN F. MACCOLLOM

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) and the dissent from the denial of rehearing *en banc* (App. B, *infra*) are reported at 511 F.2d 1116. The order of the district court (App. D, *infra*) is unreported.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*) was entered on August 2, 1974. The government's timely petition for rehearing and suggestion for rehearing *en banc* was denied on February 26, 1975 (App. B, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an indigent prisoner who did not appeal his conviction has an unconditional right to a free verbatim transcript of his trial.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

28 U.S.C. 753(f) provides in relevant part:

> * * * Fees for transcripts furnished in proceedings brought under section 2255 of this title to persons permitted to sue or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal. * * *

28 U.S.C. 1915(a) provides:

> Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and the affiant's belief that he is entitled to redress.
>
> An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

28 U.S.C. 2250 provides:

> If on any application for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis, the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending.

STATEMENT

After a jury trial in the United States District Court for the Western District of Washington, respondent was convicted of uttering forged currency, in violation of 18 U.S.C. 472. On June 4, 1970, he was sentenced to a term of ten years' imprisonment. He did not appeal. On July 6, 1971, the district court denied respondent's petition for modification of his sentence.

In March 1972 respondent (*pro se*) filed in the district court a paper designated "Motion For Transcript In Forma Pauperis." At the direction of the Chief Judge, the clerk of the court returned the "Motion" to respondent and informed him that, until respondent filed a motion pursuant to 28 U.S.C. 2255, the district court had no power to act upon his request for a transcript.

On June 23, 1972 respondent, still appearing *pro se*, filed a document entitled "Complaint for Declaratory Judgment and Injunctive Relief."[1] He alleged that he "intends to move this Court for vacation of his sentence pursuant to 28 U.S.C. § 2255," that because of his poverty he was unable to purchase a transcript of his trial, and that he believed that the transcript would show that he was not afforded effective assistance of counsel and that there was insufficient evidence to support the verdict of guilty. The complaint also alleged that without a transcript

[1] The complaint alleged jurisdiction under 28 U.S.C. 2201 (the declaratory judgment statute) and 28 U.S.C. 1391(e). Neither statute is a grant of jurisdiction; Section 1391(e) is a venue provision, and the declaratory judgment statute simply establishes a remedy available in cases for which there is an independent source of federal jurisdiction. See *Barr* v. *United States*, 478 F.2d 1152 (C.A. 10), certiorari denied, 414 U.S. 910; *Volkswagen de Puerto Rico, Inc.* v. *Puerto Rico Labor Relations Board*, 454 F.2d 38 (C.A. 1). Neither the district court nor the court of appeals discussed the problem of jurisdiction over respondent's complaint. We believe, however, that there is jurisdiction pursuant to 28 U.S.C. 2255; respondent has alleged that he is entitled to release from custody, and the request for a transcript may properly be viewed as ancillary to an underlying Section 2255 action.

respondent would be "unable to frame his arguments for fair and effective review;" it contended that his inability to obtain a transcript therefore deprived him of due process of law.[2] Respondent did not state why he believed counsel had been inadequate or the evidence insufficient, nor did he advance any reason —other than his bare assertion—to believe that the transcript would substantiate his contentions.

After respondent had filed his complaint, the district court granted him leave to proceed *in forma pauperis*; counsel was appointed and represented him at a hearing in the district court on January 12, 1973. After that hearing, the district court entered an order dismissing the complaint for failure to state a claim upon which relief could be granted (App. D, *infra*, p. 30a). Respondent appealed. During oral argument in the court of appeals, respondent's counsel "candidly argued that he cannot represent to the court that specific constitutional grounds for relief exist until after he has seen a transcript" (App. A, *infra*, p. 2a).

A divided panel of the court of appeals reversed, holding that "an indigent federal prisoner, permitted

[2] Respondent also alleged that 28 U.S.C. 753(b) and 1915(b) entitled him to a transcript. However, Section 753(b) simply establishes the manner in which notes and recordings of courtroom proceedings are to be made, and Section 1915(b) excuses an individual who has been permitted to proceed *in forma pauperis* from paying for reproduction of the record on appeal. Neither section authorizes the provision of trial transcripts without cost, and the court of appeals did not rely upon them.

to proceed *in forma pauperis*, * * * is entitled to * * * a [verbatim] transcript, upon request in order to assist him in the preparation of a post-conviction motion under 28 U.S.C. § 2255" (App. A, *infra*, p. 19a; footnote omitted). The court rejected the government's argument that an indigent prisoner[3] should be required to make a colorable claim that the transcript would be necessary to establish facts that would make out an arguably meritorious contention of entitlement to collateral relief. It concluded, instead, that because the Constitution requires the government to provide transcripts on direct appeal, it creates an identical entitlement for purposes of collateral attack.

With five judges noting their dissents, the court of appeals rejected the government's suggestion for an *en banc* rehearing. Judge Wallace, writing for the dissenters, pointed out that although "justice should not be determined by the size of a pocketbook, an indigent is not entitled to any more than an average defendant who is able to pay his own way" (App. B, *infra*, p. 24a). Because such an average defendant, who had not taken an appeal, would be unlikely to expend his resources on a transcript unless he believed that it would reveal facts necessary and likely to establish his claim for relief, Judge Wallace argued, the government is under no obligation to provide a free transcript to an indigent prisoner unless that prisoner can make a comparable showing.[4]

[3] Respondent was incarcerated at the time of the court's decision. He has since been paroled. This case is not moot, however, because an individual on parole is still "in custody" for purposes of collateral relief. *Jones* v. *Cunningham*, 371 U.S. 236; cf. *Hensley* v. *Municipal Court*, 411 U.S. 345.

REASONS FOR GRANTING THE WRIT

This case presents the question reserved by this Court in *Wade* v. *Wilson*, 396 U.S. 282, 286—whether "the Constitution requires that [the federal government] furnish an indigent * * * prisoner free of cost a trial transcript to aid him to prepare a petition for collateral relief." The question is one of significance to the administration of justice, and the decision below has created a conflict among the circuits.

1. As the court of appeals recognized (App. A, *infra*, p. 6a and n. 3), its holding conflicts with that of every other court of appeals to consider the issue.[5]

[4] The dissenters also objected to the panel's treatment of prior Ninth Circuit cases. *Wilson* v. *Wade*, 390 F.2d 632 (C.A. 9), vacated on other grounds, 396 U.S. 282, had expressly held that indigents are not entitled to transcripts at public expense unless they can make a colorable showing of need for them. The dissenters argued that only the *en banc* court was at liberty to alter *Wilson's* rule. We infer from the failure of the court to rehear this case *en banc*, however, that the majority disagrees with that proposition and that *Wilson* will no longer be followed in the Ninth Circuit.

[5] Six other courts of appeals have addressed the issue in federal cases. See *Benthiem* v. *United States*, 403 F.2d 1009 (C.A. 1), certiorari denied, 396 U.S. 945; *United States* v. *Shoaf*, 341 F.2d 832 (C.A. 4); *Cowan* v. *United States*, 445 F.2d 855 (C.A. 5); *Bentley* v. *United States*, 431 F.2d 250 (C.A. 6), certiorari denied, 401 U.S. 920; *Culbert* v. *United*

Individuals convicted in one federal district may be incarcerated in another and may have a variety of forums in which to seek collateral relief.[6] It is therefore important that the availability of transcripts be uniform throughout the federal system, lest the right turn on the fortuity of the place of sentence and confinement or a prisoner's ingenuity in forum-shopping.

2. This decision, moreover, will have substantial practical consequences for the operation of the courts. If the decision of the court of appeals is permitted to stand, any indigent federal prisoner can receive a complete verbatim transcript of his trial upon request. It is impossible to estimate the number of individuals who will be entitled to make such a request, but it probably includes a substantial proportion of all federal prisoners who did not appeal their initial convictions.[7] We have been informed by the Administrative Office of the United States Courts

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States, 325 F.2d 920 (C.A. 8); *Martinez* v. *United States*, 344 F.2d 325 (C.A. 10).

Four of those courts of appeals have also addressed the issue in state cases. See *Ellis* v. *Maine*, 448 F.2d 1325 (C.A. 1); *Jones* v. *Superintendent*, 460 F.2d 150 (C.A. 4), certiorari denied, 410 U.S. 944; *Chavez* v. *Sigler*, 438 F.2d 890 (C.A. 8); *Hines* v. *Baker*, 422 F.2d 1002 (C.A. 10).

[6] See 28 U.S.C. 2241, 2254, 2255; *Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U.S. 484; *Schlanger* v. *Seamens*, 401 U.S. 487; *Strait* v. *Laird*, 406 U.S. 341.

[7] In most cases, an indigent who appeals his conviction receives a verbatim transcript upon request. Cf. *Hardy* v. *United States*, 375 U.S. 277. Once such a transcript has been prepared, it is afforded almost as a matter of course to an indigent who seeks collateral relief. See 28 U.S.C. 2250.

that requests for transcripts to be used only for perusal in the hope of finding an error would require many hours of court reporters' time—time that otherwise could be devoted to transcribing materials necessary for appeals and arguably meritorious collateral attacks. A recent study of court reporter services indicates that the backlog of work now facing court reporters is an important contributor to appellate delay and in many parts of the country now threatens to prevent the prompt administration of criminal justice.[8] In light of this problem, transcription should be restricted to those cases in which a verbatim transcript appears likely to serve the ends of justice; preparation of transcripts not reasonably likely to be useful in any proceeding will serve only to delay the preparation of transcripts in other cases where the need may be demonstrable or even pressing.

3. Federal laws now provide that any federal prisoner who makes a nonfrivolous showing of need can receive a transcript of his trial. 28 U.S.C. 1915 (a) provides that a district court may allow an indigent to proceed without prepayment of fees or costs. Once the court has done so, 28 U.S.C. 753(f) provides that a transcript will be provided "if the trial judge or a circuit judge certifies that the suit or

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[8] See Ebersole, *Improving Court Reporting Services*, Federal Judicial Center, pp. 29-31 (February 1972). The calls upon the time of the limited pool of court reporters have been increasing; between 1966 and 1974 the number of petitions by federal prisoners seeking collateral relief increased from 2,292 to 4,987. Annual Report of the Director of the Administrative Office of the U.S. Courts, p. IX-34 (preliminary ed., 1974).

appeal is not frivolous and that the transcript is needed to decide the issue presented * * *."

The district court below carefully observed this procedure and followed the requirements of *Coppedge* v. *United States*, 369 U.S. 438. After receiving respondent's complaint, the court permitted him to proceed *in forma pauperis*. Because it was not possible to ascertain from the complaint whether, under the "objective" standard of *Coppedge*, a non-frivolous issue was presented, the district court appointed counsel, whose duty it was to attempt to discover the nature of respondent's complaint and present to the court any facts establishing that there was a need for a transcript or that the complaint was other than frivolous. As counsel later represented to the court of appeals, however, his investigations did not yield any reason to believe that the transcript would support respondent's bare assertions, or that it would be needed for any reason other than to search it in the hope that it would yield support for an assertion whose nature could not yet be discovered (App. A, *infra*, p. 2a). Because the investigation with the aid of counsel was unsuccessful, the district court was entitled, under the standards enunciated in *Coppedge*, to decline to require the government to prepare and provide respondent with a verbatim transcript. The transcript could be required here only if the standards of Sections 1915(a) and 753(f), and of *Coppedge*, deny respondent due process of law. The court of appeals concluded that they do.[9]

4. Since the 1956 decision in *Griffin* v. *Illinois*, 351 U.S. 12, it has been settled that a government can not effectively deny an otherwise available right to appeal because of indigency. The *Griffin* principle has been extended to some forms of collateral relief.[10] But in *Griffin* and its progeny the Court dealt with cases in which the government had created appeal or review rights and simultaneously conditioned the exercise of those rights upon the possession of a transcript that could not be obtained by indigents. The Court concluded that neither a State nor the federal government could provide criminal justice only to those who could afford it.

However, this principle does not compel the government to provide to indigents all of the advantages that could conceivably be acquired by the wealthy. In *Griffin* itself, and in all of the cases that followed, the Court has made it clear that the government must

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[9] The court of appeals did not expressly declare an Act of Congress unconstitutional. Had it done so, the United States could have appealed instead of seeking certiorari. See 28 U.S.C. 1252; *McLucas* v. *DeChamplain*, No. 73-1346, decided April 15, 1975. The court below believed that it was "fill[ing] a constitutional deficit not addressed by the statute" rather than declaring it unconstitutional (App. A, *infra*, p. 9a). We think it would have been more accurate for the court to acknowledge that it was striking, as unconstitutional, the two "conditions" imposed by Section 753(f)—need and lack of frivolity.

[10] See *Gardner* v. *California*, 393 U.S. 367; *Long* v. *District Court of Iowa*, 385 U.S. 192; *Lane* v. *Brown*, 372 U.S. 477.

provide free of charge only those things necessary to the exercise of the right at hand. This may mean that only selected portions of the transcript need be provided (*Griffin*, *supra*, 351 U.S. at 20), or that no transcript at all may be needed (*Britt* v. *North Carolina*, 404 U.S. 226). As this Court summarized its cases only last Term (*Ross* v. *Moffitt*, 417 U.S. 600, 616):

> [T]he fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required. The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly * * *.

Respondent had an "adequate opportunity" to present his claims fairly. He could have appealed his initial conviction, but chose not to do so. Had he appealed, he would have been entitled to the preparation of a full transcript.[11] Respondent now seeks to make his application under 28 U.S.C. 2255 do service for that appeal and to acquire the transcript he could have had if either he or his counsel had desired to appeal.

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[11] As an indigent, respondent was entitled to representation under the Criminal Justice Act, 18 U.S.C. 3006A. 28 U.S.C. 753(f) provides that fees for transcripts for individuals represented under the Criminal Justice Act shall be paid without any showing of need.

We submit that there are good constitutional grounds for distinguishing between direct appeal and collateral attack; these differences justify the requirements, contained in Section 753(f), that an indigent seeking a transcript show both a need for that transcript and that his motion for relief is not frivolous. Collateral relief is an extraordinary remedy, an exception to the rule that judgments of a competent court are final. Section 2255 does not create a right to relief from errors of the ordinary sort that might, for example, justify reversal on direct appeal. Such errors are cognizable only on appeal, and collateral attack cannot be used as a substitute. See *Sunal* v. *Large*, 332 U.S. 174, 181; *Hill* v. *United States*, 368 U.S. 424.

Moreover, many of the grounds that might arguably support collateral relief are evident from documents other than transcripts; by contrast, the transcript is most useful to establish errors (such as decisions to admit or exclude particular evidence or erroneous jury instructions) that ordinarily must be raised on appeal or not at all. We submit that it is entirely fair to require an indigent prisoner, seeking release from confinement imposed after a full trial and an opportunity for appeal as of right, to demonstrate that he has some need of a transcript. As the First Circuit put the matter, an application for collateral relief is not "a general form of relief for those who seek to explore their case in search of its existence" (*Aubut* v. *Maine*, 431 F.2d 688, 689).

Federal courts (unlike the state courts in *Griffin*) are not absolutely closed to all who cannot afford transcripts. On the contrary, an indigent who can make even a relatively minimal showing of need and possible merit in his claim is entitled (by Section 753(f)) to a transcript. The inquiry into possible need and conceivable merit is, we submit, no more demanding an inquiry than a prisoner who could afford a transcript would address to himself and his counsel. With the exception of the exceedingly wealthy for whom money is no object, an individual able to pay for a transcript would ask himself if it was likely to be of use to him. He might remember incidents at trial that he thought unfair to him; if he did, he might order a transcript to refresh his memory and create documentation in anticipation of applying for collateral relief. Section 753(f) establishes the same sort of process; respondent need only state *why* he believes that he was denied the effective assistance of counsel.[12] Once he has told the court the basis for his contention, the court could order a transcript to be prepared, direct the preparation of the relevant part (but not all) of the transcript, or rule that the allegations, even if true, would not create an entitlement to relief. There was no need for the court of appeals to go further and place the

[12] Respondent also alleged that the evidence was insufficient to support his conviction. This is ordinarily not a claim that will support a collateral attack; respondent would have to assert that there was *no* evidence to support his conviction. *Garner* v. *Louisiana*, 368 U.S. 157; *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 106.

indigent on a plane with "his wealthy cellmate" (App. A, *infra*, p. 15a) by providing the indigent with a tool that a defendant of ordinary means would not purchase for himself.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1975.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 73-1659

COLIN F. MACCOLLOM, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

[August 2, 1974]

On Appeal from the United States District Court for the Western District of Washington at Seattle

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OPINION

Before: HUFSTEDLER and GOODWIN, Circuit Judges and TAYLOR,* District Judge.

GOODWIN, Circuit Judge:

Colin F. MacCollom appeals from the dismissal of his action for declaratory and injunctive relief. He seeks preparation, at government expense, of a

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* The Honorable Fred M. Taylor, Senior United States District Judge for the District of Idaho.

verbatim transcript of his criminal trial to assist him in the preparation of a postconviction motion under 28 U.S.C. § 2255. We hold that he has the right to such a transcript, reverse, and remand the case.

MacCollom was convicted in the United States district court and was confined in 1970. Because he took no appeal, MacCollom did not request a transcript until March 1972, when he filed a "motion for transcript in forma pauperis." The clerk of the court notified MacCollom that until he filed a motion under 28 U.S.C. § 2255, the court had no power to act on his request. MacCollom then filed his complaint for declaratory and injunctive relief. His motion to proceed in forma pauperis was granted, and an attorney was appointed to assist him; but, on the government's motion, the district court dismissed the action for failure to state a claim upon which relief could be granted. Counsel has candidly argued that he cannot represent to the court that specific constitutional grounds for relief exist until after he has seen a transcript. The present state of the law seems to tell him that he must discover some constitutional claim and assert it before he can see the transcript.

The right of an indigent to receive at government expense a stenographic transcript of his criminal trial has been the subject of a number of Supreme Court decisions over the past eighteen years.[1] Be-

[1] *See generally* Note, *The Indigent's Right to a Transcript of Record*, 20 Kan. L. Rev. 746 (1972). This opinion has drawn heavily on the research and analysis of this excellent student note.

ginning with *Griffin* v. *Illinois*, 351 U.S. 12 (1956), the Court has consistently held that "[d]estitute defendants must be afforded as adequate appellate review as defendants who have enough money to buy transcripts." 351 U.S. at 19. Later cases, reasoning from equal-protection and due-process principles have expanded the indigent's right to a free transcript for use in a direct appeal. *Eskridge* v. *Washington State Board of Prison Terms & Paroles*, 357 U.S. 214 (1958) (per curiam), held that a trial transcript, which under Washington procedure had to be filed with an appeal, could not be denied merely because the trial judge did not believe that an appeal would promote justice. Five years later, in *Draper* v. *Washington*, 372 U.S. 487 (1963), a revised Washington procedure came up for review. There, the Court held that a trial judge's determination that an indigent's appeal was frivolous could not be substituted for appellate examination of a record full enough for the appellate court to draw its own conclusions. The next year, in *Hardy* v. *United States*, 375 U.S. 277 (1964), the Court held on statutory grounds that in the federal courts an attorney newly appointed on appeal was entitled to a full trial transcript. Five years later, the Court extended *Griffin* to include an appeal from a drunken-driving conviction. *Williams* v. *Oklahoma City*, 395 U.S. 458 (1969) (per curiam). Finally, in *Mayer* v. *City of Chicago*, 404 U.S. 189 (1971), the Court reaffirmed its earlier holdings, stating that though a state need not provide an indigent with a trial transcript if

other alternatives would provide him with adequate and effective appellate review, when the appellant shows a colorable need for the full transcript, the state has the burden of showing that only part of it or some substitute would be adequate.

Meanwhile, *Griffin's* constitutional principle was being extended to appeals from the denial of collateral relief. In *Lane* v. *Brown*, 372 U.S. 477 (1963), the Court held that a state prisoner was entitled to an appeal from the denial of a writ of error *coram nobis* in state court, even though the public defender who represented him at the time that the writ was denied believed that an appeal was useless and refused to order the required transcript. Two years later, in *Long* v. *District Court of Iowa*, 385 U.S. 192 (1966), the Court held that an indigent state habeas petitioner was entitled to a transcript of the hearing on his petition in order to appeal a denial of the writ. (Because a full transcript of the hearing was available, the Court did not consider whether a substitute would suffice.) Finally, in *Gardner* v. *California*, 393 U.S. 367 (1969), the Court held that where state law did not permit an unsuccessful habeas applicant to appeal directly but did permit him to file a new petition at the next appellate level, the state must furnish a verbatim record of the first habeas hearing, absent a showing that an alternative would be an adequate substitute.

Other Supreme Court decisions conferred the rights to a free transcript of a preliminary hearing. *Roberts* v. *LaVallee*, 389 U.S. 40 (1967) (per curiam), and

stated that where an adequate alternative did not exist, the defendant was entitled to a transcript of a mistrial. *Britt* v. *North Carolina*, 404 U.S. 226 (1971).

Where a state prisoner petitions federal courts for habeas corpus relief, the federal district court must hold an evidentiary hearing to make its own findings of fact and conclusions of law, if the petitioner did not receive a full and fair hearing on the merits of his claim in state court. In order to determine whether such a hearing was provided, the district court has the power to compel production of the complete state-court record, including a transcript of the testimony. Hence, a state prisoner who files a federal habeas petition is entitled to that portion of the state-court transcript relevant to a determination of the facts contested by him. *See Townsend* v. *Sain*, 372 U.S. 293 (1963); 28 U.S.C. § 2254(e).

The Supreme Court has not specifically decided whether an indigent state prisoner, who has not stated precisely what errors he claims in his state-court conviction, must be provided with a free transcript of his original trial for use in a collateral proceeding. That question was raised, but not reached, in *Wade* v. *Wilson*, 396 U.S. 282 (1970).[2] There,

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[2] "Petitioner argues that in any event, contrary to the Court of Appeals, the District Court was correct in holding that because 'it may not be possible to pinpoint . . . alleged errors in the absence of a transcript,' petitioner was entitled to a transcript for use in petitioning for habeas corpus even though he did not specify what errors he claimed in his conviction. To pass on this con-

the petitioner had used a borrowed transcript on his direct appeal, and before the Court would decide whether a free copy must be supplied for purposes of the habeas proceeding, it required him to show that a transcript could not again be borrowed.

The precise question before this court—whether an indigent federal prisoner is entitled to a free transcript of his criminal trial to assist him in the preparation of a postconviction motion under 28 U.S.C. § 2255—has not been decided by the Supreme Court. Other federal appellate courts, however, have held that a federal prisoner is not entitled to a free transcript under these circumstances, in the absence of a showing of need for the specific portion of the transcript which he requests. *See, e.g., Cowan* v. *United States*, 445 F.2d 855 (5th Cir. 1971); *Bentley* v. *United States*, 431 F.2d 250 (6th Cir. 1970), *cert. denied* 401 U.S. 920 (1971); *Benthiem* v. *United States*, 403 F.2d 1009 (1st Cir. 1968), *cert. denied* 396 U.S. 945 (1969); *United States* v. *Shoaf*, 341 F.2d 832 (4th Cir. 1964).[3]

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tention at this time would necessitate our decision whether there are circumstances in which the Constitution requires that a State furnish an indigent state prisoner free of cost a trial transcript to aid him to prepare a petition for collateral relief. This is a question of first impression which need not be reached at this stage of the case * * *." *Wade* v. *Wilson*, 396 U.S. at 286.

[3] Other federal appellate courts have held that a state prisoner is not entitled to a free transcript, without a showing of need, for use in preparing a petition for collateral relief. *See, e.g., Jones* v. *Superintendent*, 460 F.2d 150, 153, *petitioner for rehearing denied*, 465 F.2d 1091 (4th Cir. 1972),

This circuit did hold in *Wilson* v. *Wade*, 390 F.2d 632 (9th Cir. 1968), that an indigent state prisoner was not entitled to a free transcript in order to search for some basis for postconviction relief. We relied then upon what we conceded may have been dicta in *McGarry* v. *Fogliani*, 370 F.2d 42, 44 (9th Cir. 1967). *See Wilson* v. *Wade*, 390 F.2d at 634 n.1. However, our judgment in *Wilson* v. *Wade* was vacated by the Supreme Court, and the case was remanded to the district court for further proceedings. 396 U.S. 282 (1970).

Taylor v. *United States*, 238 F.2d 409 (9th Cir. 1956), *cert. denied*, 353 U.S. 938 (1957), is the only decision of this court involving the right of an indigent prisoner to obtain a free transcript for use in a 2255 proceeding. We denied the petitioner's request there, but that decision was handed down in 1956 only months after *Griffin* v. *Illinois* had been decided and before most of the case law in the free-transcript field had been developed. To the extent that *Taylor* may have been stating a constitutional doctrine, it has been thoroughly undercut by subsequent higher authority.

Moreover, *Taylor* is inconsistent with the prevailing rule in other circuits that an indigent prisoner in a 2255 proceeding is entitled to a free transcript if he can make a particularized showing of need. In

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cert. denied, 410 U.S. 944 (1973); *Ellis* v. *State of Maine*, 448 F.2d 1325, 1327 (1st Cir. 1971); *Chavez* v. *Sigler*, 438 F.2d 890 (8th Cir. 1971); *Hines* v. *Baker*, 422 F.2d 1002, 1006-07 (10th Cir. 1970).

Taylor the petitioner alleged that the government knowingly used perjured testimony to procure his conviction and that he was denied the effective assistance of counsel. Under current practice at least the first allegation probably would be sufficient to require production of the relevant portions of the transcript. *Cf. United States* v. *McDowell*, 305 F.2d 12, 14 (6th Cir.), *cert. denied* 371 U.S. 927 (1962).

Congress had endorsed the rule, initially adopted by the Fourth Circuit, that an indigent federal prisoner must make a particularized showing of need before he can obtain a free transcript of his criminal trial. Title 28 U.S.C. § 753(f) provides:

> "* * * Fees for transcripts furnished in criminal proceedings to persons proceeding under the Criminal Justice Act (18 U.S.C. 3006A), or in habeas corpus proceedings to persons allowed to sue, defend, or appeal in forma pauperis, shall be paid by the United States out of moneys appropriated for those purposes. Fees for transcripts furnished in proceedings brought under section 2255 of this title to persons permitted to sue or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal * * *."

However, for us to grant MacCollom the relief he seeks would not require us to declare section 753(f) unconstitutional. The second quoted sentence merely

authorizes under certain circumstances the payment of fees for transcripts furnished in § 2255 proceedings. The section does not prohibit courts from also requiring the government to supply an imprisoned indigent with a free transcript before he files a 2255 motion. Such a court order would simply fill a constitutional deficit not addressed by the statute.

The sentence in 28 U.S.C. § 753(f) referring to proceedings brought under § 2255 was added in 1965 (Act of Sept. 2, 1965, Pub. L. No. 89-167, 79 Stat. 647) to resolve a division of opinion among the circuits as to whether federal courts have the power, under the preceding sentence referring to habeas corpus petitions, to order transcripts for use in section 2255 proceedings. *Compare United States* v. *Glass*, 317 F.2d 200 (4th Cir. 1963), *with United States* v. *Stevens*, 224 F.2d 866 (3rd Cir. 1965). (*See* Sokol, *The Availability of Transcripts for Federal Prisoners*, 2 Am. Crim. L.Q. 63 (1964), which traces the history of section 73(f).) Notably, however, the § 2255 provision, unlike the habeas corpus provision, requires certification by the trial judge or a circuit judge that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal.[4]

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[4] What Congress intended by this certification qualification is not clear. While the bill was under consideration, then Deputy Attorney General Ramsey Clark, in a letter to the Chairman of the Committee on the Judiciary, questioned this distinction between habeas corpus and 2255 proceedings: "The reason for this distinction is not apparent if the motion remedy under section 2255 is to be a remedy commen-

At the time that this certification requirement was codified, it probably was an accurate reflection of Supreme Court case law. *See Bentheim* v. *United States*, 403 F.2d at 1011. The requirement that the judge certify that the suit or appeal was non-frivolous was hardly more than a requirement that he state affirmatively what he necessarily held by implication when he granted leave to proceed in forma pauperis. After *Coppedge* v. *United States*, 369 U.S. 438 (1962), anyone allowed to proceed in forma pauperis can be presumed to have asserted non frivolous grounds. The second requirement—that the judge certify that the transcript was needed to decide the issue tendered by the prisoner—was more significant, but probably rested on the line of Supreme Court cases which appeared to condition an indigent's right to a free transcript on a successful showing of need. *See Draper* v. *Washington*, 372 U.S. at 496; *Lane* v. *Brown*, 372 U.S. at 480; *Eskridge* v. *Washington State Board of Prison Terms & Paroles*, 357 U.S. at 215-16; *Griffin* v. *Illinois*, 351 U.S. at 16.

In recent years, however, the requirement of a particularized showing of need has been severely undercut both by the march of events and by decisions of the Supreme Court. In 1964, even before the sen-

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surate with a writ of habeas corpus." S. Rep. No. 617, 89th Cong., 1st Sess., 1965 *U.S. Code Cong. & Ad. News* 2916, 2920-21. Mr. Justice Blackmun has suggested that the Committee apparently gave little consideration to the distinction. Blackmun, *Allowance of In Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases*, 43 F.R.D. 343, 357 (1967).

tence referring to the provision of free transcripts in § 2255 proceedings was added to section 753(f), four members of the Supreme Court advocated that full transcripts be provided in all federal criminal cases to indigent defendants who seek to prosecute an appeal. *Hardy* v. *United States*, 375 U.S. at 282 (concurring opinion). In an opinion concurred in by three other justices, Mr. Justice Goldberg emphasized:

> "As any effective appellate advocate will attest, the most basic and fundamental tool of his profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law * * *. Anything short of a complete transcript is incompatible with effective appellate advocacy." 375 U.S. at 288.

Five years later, in *Gardner* v. *California*, *supra*, which held that an indigent California habeas applicant was entitled to a transcript of a previous habeas hearing for use in preparing his second habeas petition, the Court did not require the petitioner to show specifically why and how he needed a full transcript. A close reading of the opinion strongly suggests that the court's holding rests not on any assumption that some particular portion of the transcript might be essential to the second habeas application, but rather on the concession that adequate

preparation requires a complete review of the transcript of all prior relevant proceedings.

Finally, in *Britt* v. *North Carolina*, *supra*, the Court expressly questioned the constitutional validity of requiring an indigent to make a showing of need before the transcript of a mistrial must be provided at state expense. A majority of the Court, speaking through Mr. Justice Marshall, said:

> "We agree with the dissenters that there would be serious doubts about the decision below if it rested on petitioner's failure to specify how the transcript might have been useful to him. Our cases have consistently recognized the value to a defendant of a transcript of prior proceedings, without requiring a showing of need tailored to the facts of the particular case * * *." 404 U.S. at 228.

The Court went on to observe that in *Griffin* v. *Illinois*, *supra*, it had been able to rely on a concession of need by the state, and in subsequent cases, it had taken judicial notice of the importance of a transcript in a variety of circumstances. The Court then cited *Long* v. *District Court of Iowa*, *supra*, and *Roberts* v. *LaVallee*, *supra*, as examples of cases in which it had "simply found it unnecessary to discuss the question * * *." 404 U.S. at 228 n.3.

Thus, the clear trend of recent cases—*Hardy*, *Gardner* and *Britt*—has been away from the requirement that, before an indigent can obtain a free transcript of prior proceedings, he must make a showing of need tailored to the facts of a particular case.

For us to rest the denial to MacCollom of a trial transcript on the ground that he failed to specify precisely why he needed it would be to revive a rule rapidly losing favor before the Supreme Court.

In rebuttal, the government contends that the three Supreme Court opinions allegedly discounting the need for a preliminary showing of need are all distinguishable from this case: *Hardy* involved a direct apeal; *Gardner*, the equivalent of an appeal from a prior denial of a petition for habeas corpus (*see Hoover* v. *United States*, 416 F.2d 431, 432 (6th Cir. 1969)); and *Britt*, a prior mistrial. Unlike the transcripts at issue in these cases the government continues, a transcript of MacCollom's original trial would be of relatively little value to him at this time. Quoting from the opinion of the Court of Appeals for the Fourth Circuit in *United States* v. *Shoaf*, *supra*, the government argues:

> "In collateral proceedings * * * most of the trial errors warranting attention in direct appeals are not reviewable. Unless there has been such essential unfairness as to constitute a deprivation of a constitutionally protected right, the right to review trial errors is lost when a direct appeal is voluntarily forgone * * *.
>
> "The usual grounds for successful collateral attacks upon convictions arise out of occurrences outside of the courtroom or of events in the courtroom of which the defendant was aware and can recall without the need of having his memory refreshed by reading a transcript or a partial transcript to support some ground of collateral

> attack, but rarely, if ever, would the defendant, himself, need a transcript of the trial to become aware of the events or occurrences which constitute a ground for collateral attack." 341 F.2d at 835.

Assuming that the "usual" ground for collateral relief do involve either outside the courtroom or events inside the courtroom which some defendants might recall without the aid of a transcript—and we are aware of no empirical study to support this assumption [5]—we have no reason to know whether a particular transcript would contain a basis for collateral attack, not obvious to a layman with even a good memory. No one has seen MacCollom's trial transcript, and some statistical probability concerning the content of most trial transcripts seems a poor reason to deny MacCollom acess to his own.

The Fourth Circuit rule requires an imprisoned indigent to remember constitutional deficiencies and to relate them to an attorney or directly to the court, neither of whom may have had any previous contact with the prisoner or his trial, with sufficient clarity

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[5] *See* Smith, *Title 28, Section 2255 of the United States Code—Motion to Vacate, Set Aside or Correct Sentence: Effective or Ineffective Aid to a Federal Prisoner?*, 40 Notre Dame Law. 171, 183-85 n.52 (1965), for a list of the grounds relied on most frequently in motions to vacate brought under section 2255. *See also* A.B.A. Project on Minimum Standards for Criminal Justice, *Post-Conviction Remedies* § 2.1 (Commentary), at 33 (1968 approved draft); Orfield, *Motion to Vacate under 28 U.S.C. Section 2255: Part Two*, 2 Creighton L. Rev. 213 (1969); 2 C. Wright, *Federal Practice and Procedure* § 594, at 595-606 (1969).

and accuracy to establish a particularized need for part or all of his trial transcript. Meanwhile, his wealthy cellmate is permitted to purchase a trial transcript and hire an attorney to peruse it at his leisure in search of ground for collateral relief. The Fourth Circuit has said that an indigent is not entitled to a transcript at government expense "merely to comb the record in the hope of discovering some flaw." *United States* v. *Glass*, 317 F.2d at 202. However, we do not read the Supreme Court's opinions nor the Constitution itself to require paupers to have better memories than the affluent. *See Bentley* v. *United States*, 431 F.2d at 253.[6]

The principle established by *Griffin* and its progency does not guarantee indigents the same treatment afforded wealthy defendants; rather it is only neces-

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[6] *See also* R. Sokol, *Federal Habeas Corpus* 219-20 (2d ed. 1969):

> "* * * Does a prisoner have a constitutional right 'merely to comb the record in the hope of discovering some flaw'? Why doesn't he? A wealthy prisoner, James Hoffa for example, no doubt has this advantage. Why should not a poor prisoner? How great after all would be the cost of furnishing to every indigent convicted prisoner a trial transcript automatically regardless of whether requested or not? Allegations of ineffective assistance of counsel present more difficult problems. It is inherently impossible to assure that everyone has a lawyer of equal ability, although it is feasible to attempt to assure that everyone has a lawyer whose competence is above a certain minimum level. This kind of problem is not relevant, though, to the furnishing of transcripts where it is no difficult matter to put both indigent and nonindigent on the same plateau * * *."

sary that they be given equivalent and fundamentally fair treatment. *See* Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal Policy Observations*, 48 Minn. L. Rev. 1, 10 (1963).[7] In *Ross* v. *Moffit*, —— U.S. —— (June 17, 1974), the Supreme Court held that neither the due process clause nor the equal-protection clause requires a state to provide an indigent with counsel either on his discretionary appeal to the state supreme court or on his petition for certiorari in the United States Supreme Court. However, the Court also observed that the equal-protection clause requires that "indigents have an adequate opportunity to present their claims fairly within the adversarial system." —— U.S. at —— (slip opinion at 11). A rule which demands that an indigent establish his need for a trial transcript, which he has never seen, before the government will produce it for his assistance in preparing a post-conviction motion under 28 U.S.C. § 2255 may completely deny the indigent the opportunity to present a valid claim which he was not fortunate enough to remember. This rule seems to us to be a-short-sighted approach that elevates economy over equality.

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[7] Although the equal-protection clause of the Fourteenth Amendment is not directly applicable to the federal government, the due process clause of the Fifth Amendment is broad enough to encompass Fourteenth Amendment equal protection and due process, at least in transcript cases. As the Court of Appeals for the Fourth Circuit has said,

> "* * * [U]nder the due process clause the minimal standards of justice ought not to be appreciably lower in the federal courts than the Federal Constitution requires in the state courts." *United States* v. *Shoaf*, 341 F.2d at 835-36.

See generally Schneider v. *Rusk*, 377 U.S. 163, 168 (1964); *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954).

The increased cost to the government of providing free transcripts to all imprisoned indigents for use in preparing § 2255 motions should not be overestimated. Title 28 U.S.C. § 753(b) already requires that a verbatim record be kept of all proceedings in open federal court. Those indigents who have appealed their convictions routinely obtain complete or relatively complete trial transcripts for use on appeal. Since *Hardy* v. *United States*, *supra*, decided in 1964, where a new counsel has been appointed for the appeal he has been able to obtain a full transcript. Even where the trial lawyer is also appointed for the appeal, in some districts he is able to obtain a full transcript as a matter of form. *See* Note, *The Indigent's Right to a Transcript of Record*, 20 Kan. L. Rev. 766 n.135. In this circuit, except in very rare cases, a full trial transcript is prepared for any appellant who requests one, whether or not his retained or appointed trial attorney continues to serve him for the appeal. Also, since most criminal defendants plead guilty rather than are found guilty after trial,[8] the cost of

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[8] The ABA Project on Standards for Criminal Justice, *The Prosecution Function and the Defense Function* pt. VI, at 244 (1971 approved draft), states that "the overwhelming percentage of criminal cases in all state and federal courts, something on the order of 90 per cent, are disposed of by pleas of guilty * * *." In the district of Oregon, for example, fig-

many of the requested transcripts will be minimal. Finally, of the relatively few federal prisons who have not already obtained a trial transcript, many or even most will have no wish to file a motion to vacate sentence and, hence, will not even seek a transcript.

Even more to the fiscal point is the cost of litigating transcript questions. *In Hardy* v. *United States* the government conceded that in one district, requests for transcripts for use on appeal were not even opposed where the cost of the transcript would not exceed $200.00. The United States Attorney observed that in these cases the cost of opposing the motion would exceed the cost of preparing the transcript. 375 U.S. at 279 n.1. *See also Hardy* v. *United States*, 375 U.S. at 289-92 (concurring opinion of Goldberg, J.).

The present statutory scheme requires prisoners and their attorneys to assert § 2255 claims in the hope that they will be supported by the transcript once it has been prepared. If a free transcript were prepared on demand, the transcript may well reveal no colorable grounds for collateral attack, and the court will be spared the time consumed in a transcript hearing and a frivolous 2255 motion. *See generally* Jacob & Sharma, *Justice after Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 Kan. L. Rev. 493, 496-97, 509 (1970).

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ures prepared for the Administrative Office reveal that during calendar year 1973, of the 212 defendants found guilty, 176 (or approximately 83 per cent) pleaded guilty, and only 36 were found guilty after trial.

Thus, having surveyed many of the costs associated with the present system of requiring a court to certify that a particular portion of the record is needed to decide a specific point raised by a § 2255 motion, we are far from convinced that a rule entitling an indigent prisoner to a free transcript upon request would greatly increase the overall cost to the federal judicial system. However, even if we concede that there will be a net increase in cost, there is good authority for looking beyond the dollar sign: "An affluent society ought not be miserly in support of justice, for economy is not an objective of the system * * *." *Mayer* v. *City of Chicago*, 404 U.S. at 201 (concurring opinion of Burger, C.J.). *See also Mayer* v. *City of Chicago*, 404 U.S. at 196-97.

We hold then that an indigent federal prisoner,[*] permitted to proceed in forma pauperis, who has not yet obtained a transcript of his criminal trial, is entitled to such a transcript, upon request in order to assist him in the preparation of a postconviction motion under 28 U.S.C. § 2255.

Reversed and remanded.

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[*] Our holding that the government must supply a free transcript to an indigent, convicted, federal prisoner for the purpose of preparing a 2255 motion does not necessarily mean that we also would require the government to supply a free transcript to an indigent who has been convicted but is no longer in prison. We have before us only a federal prisoner seeking a transcript, and we pass only on his claim. *See Hardy* v. *United States, supra; Smith* v. *Bennett*, 365 U.S. 708, 713 (1961).

TAYLOR, District Judge, Dissenting:

Appellant was convicted and sentenced to imprisonment for violation of Title 18 U.S.C. § 472 (passing forged currency) on June 4, 1971, from which conviction and sentence no appeal was taken. Appellant has never filed an application for post-conviction relief under and pursuant to 28 U.S.C. § 2255, nor made any showing that he is entitled to any such relief.

On June 23, 1972, appellant, proceeding in forma pauperis, filed the present action against the United States seeking a verbatim transcript of his criminal trial, at government expense, to aid him in the preparation of a motion to vacate his sentence pursuant to 28 U.S.C. § 2255. The complaint was dismissed by the district court for failure to state a claim on which relief could be granted and this appeal followed.

The issue presented on this appeal is whether appellant, as an indigent prisoner, has a constitutional or statutory right to a free transcript in order to search for error upon which to base a Sec. 2255 petition. The majority of the panel has concluded that he has such a constitutional right, with which conclusion I respectfully disagree.

In the majority opinion it seems to be admitted that thus far all federal courts have consistently held that an indigent prisoner has no constitutional or statutory right to a free transcript for use in preparing a collateral attack on his conviction or sentence.

These authorities are cited in the majority opinion. In *Wilson* v. *Wade*, 390 F.2d 632, 634 (1968), this court indicated it would adhere to the general rule of denying a transcript which would enable the petitioner to "comb the record in hope of discovering some flaw". However, the judgment in *Wade* was vacated for a different reason and the Supreme Court declined to pass on the precise question of whether the petitioner, a state prisoner, was entitled to a transcript for use in petitioning for a writ of habeas corpus. *Wade* v. *Wilson*, 396 U.S. 282, 286 (1969). This court in *United States ex rel. Nunes* v. *Nelson*, 467 F.2d 1380 (1972), was presented with a somewhat similar, although not identical, issue. In that case, a state prisoner sought to "inspect certain items of evidence . . . for use in preparing a future petition for a writ of habeas corpus . . . ". The relief sought was denied with the observation that "[w]hat Nunes apparently wants is a license to enable him to search through a wide variety of items in order either to discover whether he has grounds for a collateral attack or to facilitate preparing a petition for collateral relief.'

Although the majority opinion appears to recognize that federal court precedent is contrary to what is being held in this case, it is reasoned that the current trend is contrary to the prior decisions and that this court should follow the trend and make some new law. I am unable to agree with this theory. I submit that the authorities relied on by the majority

do not compel a decision contrary to the weight of precedent.

Apparently appellant did not consider it necessary to appeal from the judgment of conviction, even though he no doubt was advised by the trial court of his right to do so and knew he could exercise such right. He has not made any claim or showing which would indicate that he may have been convicted of a crime of which he is innocent or that any of his rights were violated. He only asserts a desire to review the record to find some legal point which he can argue as a basis for release from confinement. He should not need a transcript to know whether he was convicted erroneously or whether some new circumstances have arisen to show some fatal constitutional error in the prior proceedings.

I submit that the mere fact the appellant is indigent does not entitle him to a free transcript upon request for the mere purpose of searching the record in an attempt to find possible grounds to assert a claim for post-conviction relief.

Since the action brought by appellant against the United States is for a declaratory judgment and injunctive relief, it occurs to me that there is an immunity question to be considered even though it has not been specifically raised. It does not appear that there is any statutory authority authorizing such an action and it is my understanding that absent a waiver of sovereign immunity by specific congressional consent, the federal district courts have no jurisdiction over claims against the United States.

I would affirm the Order of Dismissal.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NINTH CIRCUIT

No. 73-1659

[Filed Feb. 26, 1975, Clerk, U.S. Court of Appeals]

COLIN F. MACCOLLOM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ORDER

DC-422-72C2

Appeal from the United States District Court for the Western District of Washington at Seattle

Before: HUFSTEDLER and GOODWIN, Circuit Judges and TAYLOR,* District Judge

The panel as constituted in the above case having voted to deny the petition for rehearing, the full court was advised of the suggestion for en banc rehearing and of the panel's vote. Judge Wallace requested a vote of all regular active judges of the court. The request for en banc consideration failed to obtain a majority of the votes.

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* The Honorable Fred M. Taylor, Senior United States District Judge for the District of Idaho, sitting by designation.

Accordingly, the petition for rehearing is denied, and the suggestion for rehearing en banc is rejected. The mandate will issue forthwith.

WALLACE, Circuit Judge, with whom Judges WRIGHT, TRASK, CHOY and SNEED concur, Dissenting from Order Denying Petition for Rehearing En Banc:

Our failure to take this case en banc is unfortunate. Not only do I believe the decision wrong on the merits but it is directly contrary to prior Ninth Circuit precedent which should not be overruled other than by our court sitting en banc.

First, although justice should not be determined by the size of a pocketbook, an indigent is not entitled to any more than an average defendant who is able to pay his own way. As the Supreme Court recently stated in a case denying indigents a constitutional right to counsel on discretionary appeals:

> The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.

Ross v. *Moffitt*, 417 U.S. 600, 616 (1974). The *MacCollom* majority compares the indigent to "his wealthy cellmate." —— F.2d at ——. That is not the test. The Supreme Court rejected this view in *Ross* v. *Moffitt*, *id.* I do not believe the average defendant would purchase a transcript in order to comb

through it for possible error. The majority opinion thus places the indigent in a more favorable position than the average defendant who pays his own way.

The *MacCollom* opinion acknowledges that other circuits deciding this issue come out diametrically opposed to the majority. —— F.2d at —— & n.3. Indeed, the majority can find no circuit case in accord with its holding. Before we create inter-circuit conflict, here between us and the First, Fourth, Fifth, Sixth and Tenth Circuits, we should be persuaded the rest are wrong. I, for one, am not.

Second, the *MacCollom* decision is directly contrary to prior Ninth Circuit cases. *Wilson* v. *Wade*, 390 F.2d 632 (9th Cir. 1968), *vacated*, 396 U.S. 282 (1970), explicitly held that a state prisoner is not entitled to a free transcript "to comb the record in the hope of discovering some flaw." *Id.* at 634. Although *Wade* concerned habeas corpus rather than section 2255, it decided the same constitutional issue as *MacCollom*. *See id.* at 633-34; *MacCollom* v. *United States*, —— F.2d at ——. The majority declines to follow *Wade* because the Supreme Court vacated judgment and remanded to the district court. The vacation, however, did not concern the merits of our holding. *See Wade* v. *Wilson*, 396 U.S. 282, 286-87 (1970). It is interesting to note that *Wade* has been used as authority by our court in spite of the vacation by the Supreme Court. *See MaGee* v. *Nelson*, 455 F.2d 275, 276 (9th Cir.), *cert. denied*, 405 U.S. 1070 (1972).

In *Taylor* v. *United States*, 238 F.2d 409 (9th Cir. 1956), *cert. denied*, 353 U.S. 938 (1957), we denied

a trial transcript in a section 2255 case. The majority contends that *Taylor* need not be followed because it was decided "only months" (actually seven months) after *Griffin* v. *Illinois*, 351 U.S. 12 (1956). —— F.2d at ——. This is not persuasive. I assume the *Taylor* panel was aware of *Griffin* but even if it were not, the denial of certiorari in *Taylor* may be some indication that the Supreme Court did not believe that *Griffin* required a different result. Although *Taylor* did not discuss the constitutional issue raised in *MacCollom*, I think an en banc hearing is necessary to overrule it.

The majority's opinion also does not present adequate grounds for disapproving *McGarry* v. *Fogliani*, 370 F.2d 42, 44 (9th Cir. 1966). *McGarry* held that a state prisoner does not have a right to a trial transcript when he petitions for habeas corpus in federal court. *Id.* at 44. The *MacCollom* majority construes this holding to be dictum, —— F.2d at ——, relying on the following language in *Wade*, *supra*, 390 F.2d at 634 n.1:

> Such authority as is available is in accord with what was stated in McGarry, see footnote 7 [of *McGarry*], where the court cites United States v. Glass, 4th Cir., 317 F.2d 200, 202. Although the language there is in accord with the McGarry decision, under the circumstances of *that* case it may be dictum. (Emphasis added.)

This argument fails for several reasons. First, *MacCollom's* use of the passage quoted above is just erroneous. The footnote refers to a dictum in *United States* v. *Glass*, 317 F.2d 200, 202 (4th Cir. 1963), not in *McGarry*. A reading of *Glass* bears this out. *Id.* at 202-03. Furthermore, *Wade* relied upon *McGarry* as requiring the result held. The footnote quoted above is appended to the following sentence in the text of the *Wade* opinion:

> So far as the district court's findings are concerned, our holding in McGarry v. Fogliani, supra, would require us to say that Wade was not entitled to demand a transcript merely to enable him to comb the record in the hope of discovering some flaw.

390 F.2d at 634.[1] Moreover, even if the majority were correctly interpreting the footnote in *Wade*, it would not be persuasive. Regardless of how *Wade* interprets *McGarry*, a reading of *McGarry* reveals it to hold that state habeas petitioners are not entitled to a transcript as of right. *McGarry*, *supra*, 370 F.2d at 44.

The final argument advanced by the *MacCollom* majority for abandoning the prior Ninth Circuit decisions in *contra* is that they have been undercut by subsequent Supreme Court decisions. I disagree. As late as its decision in *Wade* in 1970, the Supreme Court was willing to avoid the issue of the right to a transcript on collateral review, describing it as

---

[1] I cannot understand how the *MacCollom* majority can on one hand dismiss the holding of *Wade* on the ground that the Supreme Court vacated the judgment and on the other hand, salvage a footnote from that opinion in order to show that the language in *McGarry* was dictum.

"a question of first impression." 396 U.S. at 286. The only subsequent decisions cited in *MacCollom* are at best inconclusive on this issue. *Britt* v. *North Carolina*, 404 U.S. 226 (1971), held that a state criminal defendant need not receive a transcript of his mistrial before he is tried again if a substantially equivalent alternative is available. In dicta, the Court both questioned the constitutionality of requiring a particularized showing of need for transcripts and admitted that the "outer limits" of the right to a transcript remain unclear. 404 U.S. at 227-28. The other decision cited in *MacCollom* is *Ross* v. *Moffitt*, *supra*, 417 U.S. 600, which denied a constitutional right to counsel on discretionary appeals to a state's highest court. As argued above, this case undermines rather than strengthens the reasoning of the *MacCollom* majority. These cases, therefore, do not require abandonment of our prior holdings.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 73-1659

DC #422-72C2

COLIN F. MACCOLLOM, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

JUDGMENT

APPEAL from the United States District Court for the Western District of Washington.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded.

[SEAL]

A True Copy
Attest 5/15/75

EMIL E. MELFI, JR., Clerk

by /s/ Ray Hewitt
RAY HEWITT, Senior Deputy

Filed and entered August 2, 1974

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. 422-72C2

COLIN F. MACCOLLOM, PETITIONER

v.

UNITED STATES OF AMERICA, DEFENDANT

ORDER OF DISMISSAL

On this 12th day of January, 1973 came the petitioner represented by his counsel, John Strait, and the respondent by counsel, the Court having read the memoranda submitted by counsel, heard argument and being fully apprised of the premises does now

ORDER the complaint dismissed for failure to state a claim on which relief can be granted.

DATED this 12th day of January, 1973.

/s/ Walter T. McGovern
United States District Judge

Presented by:

/s/ Irwin H. Schwartz
IRWIN H. SCHWARTZ
Assistant United States Attorney

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 576382 165

Supreme Court, U. S.
FILED
NOV 21 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1487

UNITED STATES OF AMERICA,
Petitioner,

v.

COLIN F. MACCOLLOM

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED MAY 27, 1975
CERTIORARI GRANTED OCTOBER 6, 1975

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1487

UNITED STATES OF AMERICA,

Petitioner,

v.

COLIN F. MACCOLLOM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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[1] The opinion, order denying rehearing, and judgment of the court of appeals and the district court order of dismissal are reproduced in the appendix to the petition for a writ of certiorari.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

Criminal No. 51287

UNITED STATES OF AMERICA

v.

COLIN FERGUS MACCOLLOM

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1967	
Sept. 12	Filed Indictment
	* * *
1970	
June 3	ENT. RECORD OF TRIAL BY JURY (2nd day).
"	Filed Verdict of Guilty as charged.
"	SENTENCE: TEN (10) YEARS—Imprisonment. Remanded
	* * *
Sept. 18	Filed Defendant's Motion to Reduce Sentence.
"	Filed Defendant's Notice of Hearing Motion to Reduce Sentence, set September 25, 1970, 9:30 a.m.
	* * *
Sept. 25	Filed and ent. Order Modifying Sentence to ten years imprisonment under 18: 4208(a) (2). Filed Court Reporter's Transcript of hearing 9-25-70.

DATE	PROCEEDINGS
1971	
July 6	Filed letter from defendant as modification of sentence. Filed and ent. Order denying petition for modification of sentence.
1972	
Mar. 17	Filed Statement
"	Filed Motion for Transcript IFP.
"	Filed Motion to Proceed IFP.
"	Filed Affidavit of Poverty.
"	Filed Notice of Motion for April 14th at 9:30 a.m.
"	Filed Memorandum in support of Motion requesting Transcript.
Apr. 10	Filed Memorandum in Opposition to petitioner's request for a free transcript.
May 1	Filed memorandum in reply to respondent's opposition memorandum.
May 4	Ent. order continuing above motion to 5/19/72 at 9:30 a.m.
May 5	Ent. order striking hearing for lack of jurisdiction.

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

Civil No. 422-72C2

COLIN F. MACCOLLOM

v.

UNITED STATES OF AMERICA

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1972	
6/23	Filed Motion to proceed in forma pauperis and entd. Order Granting motion to proceed.
"	Filed Motion requesting appointment of counsel.
"	Filed Complaint for declaratory Judgment and Injunctive relief.
"	Filed Memorandum in support of complaint.
6/29	Issued Summons.
"	Entd. Order appointing John Darrah to represent plaintiff.
7/7	Filed Marshals return on US.
Dec 13	Filed Defendant's motion to dismiss.
"	Filed Memorandum in support of motion to dismiss.
"	Filed notice of motion; Jan. 5, 73 at 9:30.

DATE	PROCEEDINGS
1973	
Jan 5	Ent order cont defts motion to dismiss; Jan. 12, 73.
Jan 12	Filed Memorandum in reply to respondent's motion to dismiss.
"	Filed and ent Order of Dismissal.
Mar 1	Filed plaintiff's motion for extension of time to file appeal.
"	Filed notice of motion: March 16, 73 at 9:30.
Mar 12	Filed Petitioners' notice of appeal.
"	Handed copy to U.S. Attorney.
Mar 16	Ent order Granting plaintiff's motion for extension of time to file notice of appeal.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 73-1659

COLIN F. MACCOLLOM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1973	
Apr. 12	Docketed cause & entered appearances of counsel.
1974	* * *
May 8	Argued & submitted to: Hu, G, CJJ; Taylor, DJ
Aug. 2	Ordered opinion (Goodwin), Taylor dissenting, filed & Judg. to be filed & entd.
Aug. 2	Filed opinion—Reversed and remanded
Aug. 2	Filed & entd. judgment
	* * *
Sep. 11	Filed original & 15 copies Aples petition for rehearing and suggestion for rehearing en banc. (To all active judges)
1975	
Feb. 26	Filed order (Hu, G. Taylor)—the petition for rehearing is denied, and the suggestion for rehearing en banc is rejected. The mandate will issue forthwith. Judge Goodwin dissenting opinion.
Feb. 27	Issued Judgment.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

No.

COLIN F. MACCOLLOM, PETITIONER

vs.

UNITED STATES, RESPONDENT

MOTION FOR TRANSCRIPT
IN FORMA PAUPERIS

1. This is a motion for transcripts in *forma pauperis* pursuant to 28 U.S.C. §§ 1915, 753(b).

2. Movant requests that he be furnished a full transcript of his criminal trial held in this Court on June 4, 1970.

3. Because of movant's indigency, he requests that the transcript be furnished at government expense. A motion to proceed *in forma pauperis* and supporting affidavit are filed herewith.

4. Movant intends to move this Court for vacation of his sentence pursuant to 28 U.S.C. § 2255.

5. Movant in good faith believes that the transcript will show that:

a. Movant was not afforded effective assistance of counsel as required by the Sixth Amendment to the United States Constitution.

b. There was insufficient evidence to support the judgment of guilty, which deprived movant of his right to a fair trial guaranteed by the Due Process Clause of the Fifth Amendment to the United States Constitution.

6. Movant believes that the full transcript of trial is needed in order to prepare and present his constitutional contentions. Movant's memory and trial notes are inadequate.

7. Movant is unable to borrow a copy of the transcript he requests.

8. Without a copy of the transcript, movant is unable to frame his arguments for fair and effective review.

WHEREFORE, petitioner moves this court to order the United States to furnish petitioner with a full transcript of his trial.

/s/ Colin F. MacCollom
COLIN F. MACCOLLOM
Petitioner
P.O.B. 1000
Leavenworth, Kansas 66048

SUBSCRIBED AND SWORN to before me this 13th day of March, 1972.

/s/ J. J. O'Connor
Notary Public

"Authorized by the act of July 7, 1955
to administer oaths (18 U.S.C. 4004)."

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

No.

COLIN F. MACCOLLOM, PETITIONER

vs.

UNITED STATES, RESPONDENT

MOTION TO PROCEED IN FORMA PAUPERIS

Comes the petitioner, COLIN F. MACCOLLOM, and moves this court pursuant to 28 U.S.C. Section 1915 for permission to proceed *in forma pauperis* in filing the attached motion for transcript. An affidavit in support of this motion is attached hereto.

/s/ Colin F. MacCollom
COLIN F. MACCOLLOM
P.O.B. 1000
Leavenworth, Kansas, 66048

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

No.

COLIN F. MACCOLLOM, PETITIONER

vs.

UNITED STATES, RESPONDENT

AFFIDAVIT OF POVERTY

I, Colin F. MacCollom, being first duly sworn according to law, state in support of my attached MOTION TO PROCEED IN FORMA PAUPERIS:

1. I am the petitioner in the above-entitled case;
2. I am unable, because of my poverty, to pay the costs of this case;
3. I am unable to give security for it;
4. I believe in good faith that I am entitled to the relief I am seeking;
5. I request counsel to be appointed because of my poverty.

/s/ Colin F. MacCollom
COLIN F. MACCOLLOM
P.O.B. 1000
Leavenworth, Kansas 66048

SWORN TO BEFORE ME THIS
23rd day of Feb., 1972.

/s/ J. J. O'Connor
Notary Public

"Authorized by the act of July 7, 1955
to administer oaths (18 U.S.C. 4004)."

May 5, 1972

Mr. Colin F. MacCollom 33998
P.O. Box 1000
Leavenworth, Kansas 66048

Re: Motion for Transcript in Forma Pauperis, placed in the file jacket of cause 51287

Dear Mr. MacCollom:

The court has directed me to write you regarding your "Motion for Transcript in Forma Pauperis, which you previously were informed was set for hearing on May 19, 1972.

The court feels that the judgment in Cause 51287 completely closes that case. The proper remedy for you to persue at this time is set out in 28 U.S.C. § 2255.

This court's rules require that motions under 28 U.S.C. § 2255 must be presented on forms supplied by the clerk. Such forms have been sent to you.

In your motion for transcript, you specifically state that you are not filing a 2255 motion at this time. I have been directed to inform you that until such a motion is filed, the court has no power to act on your request for a transcript.

Sincerely yours,

CHARLES A. SCHAAF, Clerk

cc: U.S. Attorney

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

No. 422-72C2

COLIN F. MACCOLLOM, PETITIONER

v.

UNITED STATES, RESPONDENT

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

1. This is an action for declaratory judgment pursuant to 28 U.S.C. § 2201 and 28 U.S.C. § 1391(e), vesting the several district courts of the United States with jurisdiction to declare the rights and other legal relations of any interested party seeking such declaration in a civil action in which the United States is respondent and the cause of action arose in the district where the action is brought. This action is for the purpose of determining a question of actual controversy between the parties, as hereinafter more fully appears, and for the purpose of obtaining injunctive relief from irreparable injury suffered by petitioner as a result of respondent's inaction.

2. Petitioner here, COLIN F. MACCOLLOM, was defendant in a criminal trial, docket number 51287, held in this Court on June 4, 1970. He was convicted of violating 18 U.S.C. § 472, passing forged currency, and was sentenced to serve ten years in prison. No appeal was taken.

3. Petitioner now intends to move this Court for vacation of his sentence pursuant to 28 U.S.C. § 2255.

4. Because of his poverty, petitioner is unable to purchase a copy of the transcript of the aforementioned criminal trial.

5. Petitioner in good faith believes the transcript will show that:

a. Petitioner was not afforded effective assistance of counsel as required by the Sixth Amendment to the United States Constitution.
b. There was insufficient evidence to support the verdict of guilty, which deprived petitioner of his right to a fair trial guaranteed by the Due Process Clause of the Fifth Amendment to the United States Constitution.

6. Petitioner believes that the full, verbatim transcript of trial is needed in order to prepare and present his constitutional contentions. Petitioner's memory and trial notes are inadequate.

7. Petitioner is unable to borrow a copy of the verbatim transcript.

8. Without a verbatim transcript, petitioner is unable to frame his arguments for fair and effective review.

9. Accordingly, at present, petitioner is deprived of fair and effective use of the post-conviction motion (§ 2255) procedure solely because he cannot pay for a verbatim transcript of trial. Such deprivation is fundamentally unfair and a violation of the DUE PROCESS CLAUSE of the FIFTH AMENDMENT.

10. Because affluent federal prisoners may take full advantage of the post-conviction motion procedure by purchasing a verbatim transcript, and because petitioner, because of his poverty, is not able to make such a purchase, petitioner is denied equal protection of the law. Such invidious discrimination, based solely upon a government-imposed classification according to wealth, is in violation of the DUE PROCESS CLAUSE of the FIFTH AMENDMENT.

11. In the alternative, petitioner has a statutory right to a verbatim transcript, furnished at government expense, pursuant to 28 U.S.C.A. §§ 753(b) and 1915(b).

WHEREFORE, petitioner demands that the Court, without hearing, adjudge:

1. That petitioner has an absolute constitutional right to a verbatim transcript of his criminal trial, supplied at government expense, to aid him in preparing a motion to vacate sentence.

2. In the alternative, that petitioner has a statutory right to a verbatim transcript.

3. That respondent is ordered to purchase a verbatim transcript to be supplied to petitioner.

4. That petitioner be given all such other, further and different relief as the Court may deem just.

If the Court considers a hearing necessary, petitioner requests that one be had and that counsel be appointed to assist and represent petitioner. An appropriate motion is attached.

I, COLIN F. MACCOLLOM, of lawful age, being first duly sworn, state that I have read the above and foregoing complaint and know the contents thereof; that the statements made therein are true and correct.

/s/ Colin F. MacCollom
COLIN F. MACCOLLOM
#33998
Petitioner
P.O.B. 1000
Leavenworth, Kansas 66048

SUBSCRIBED AND SWORN TO BEFORE ME THIS 13 day of June, 1972.

/s/ G. R. Galey
Notary Public

"Authorized by the act of July 7, 1955 to administer oaths (18 U.S.C. 4004)."

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

No.

COLIN F. MACCOLLOM, PETITIONER

vs.

UNITED STATES, RESPONDENT

MOTION TO PROCEED IN FORMA PAUPERIS

Comes the petitioner, COLIN F. MACCOLLOM, and moves this court pursuant to 28 U.S.C. Section 1915 for permission to proceed *in forma pauperis* in filing the attached complaint for declaratory judgment and injunctive relief. An affidavit in support of this motion is attached hereto.

/s/ Colin F. MacCollom
COLIN F. MACCOLLOM
#33998
Petitioner
P.O.B. 1000
Leavenworth, Kansas 66048

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

No.

COLIN F. MACCOLLOM, PETITIONER

vs.

UNITED STATES, RESPONDENT

MOTION REQUESTING APPOINTMENT OF COUNSEL

Comes the petitioner, COLIN F. MACCOLLOM, and moves this Court pursuant to 28 U.S.C. Section 1915 for appointment of counsel to assist and represent petitioner in this action for declaratory judgment and injunctive relief. An affidavit in support of this motion is attached hereto.

/s/ Colin F. MacCollom
COLIN F. MACCOLLOM
33998
Petitioner
P.O.B. 1000
Leavenworth, Kansas 66048

STAN PITKIN
United States Attorney

IRWIN H. SCHWARTZ
Assistant U. S. Attorney

1012 U. S. Courthouse
Seattle, Washington 98104

(206) 442-7970

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. 422-72C2

COLIN F. MACCOLLOM, PETITIONER

v.

UNITED STATES OF AMERICA, DEFENDANT

MOTION TO DISMISS

COMES NOW the defendant UNITED STATES OF AMERICA, through its attorney Irwin H. Schwartz, and moves the court to dismiss the complaint in the above entitled matter for failure to state a claim upon which relief can be granted.

DATED this 14th day of December, 1972.

STAN PITKIN
United States Attorney

/s/ Irwin H. Schwartz
IRWIN H. SCHWARTZ
Assistant U. S. Attorney

SUPREME COURT OF THE UNITED STATES

No. 74-1487

UNITED STATES, PETITIONER

v.

COLIN F. MACCOLLOM

ORDER ALLOWING CERTIORARI, Filed October 6, 1975

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

Mr. Justice Douglas took no part in the consideration or decision of this petition.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 596869 108

Supreme Court, U. S.
FILED
JUL 24 1975
MICHAEL RODAK, JR., CLERK

No. 74-1487

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

THE UNITED STATES OF AMERICA, PETITIONER

vs.

COLIN F. MacCOLL[illegible], RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

John A. Strait
Attorney for Respondent
1712 Belmont - Suite 1
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206/322-5190

University of Puget Sound
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Cases:

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

No. 74-1487

UNITED STATES OF AMERICA,

Petitioner,

vs.

COLIN F. MacCOLLOM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra) and the dissent from the denial of rehearing en banc (App. B, infra) are reported at 511 F.2d 1116. The order of the district Court (App. D, infra) is unreported.(Appendix references are to Petition).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether an indigent prisoner, poorly educated, who did not appeal his original trial conviction, is entitled to a transcript of his trial at public expense in order to prepare his application for post conviction relief pursuant to 28 U.S.C. 2255 where the prisoner asserts good faith belief of error; no independent memory of error; no alternative to the transcript is available to demonstrate the error, and the District Court has found a lack of frivolity in the claim of error by granting leave to proceed in forma pauperis pursuant to 28 U.S.C. 1915(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the pertinent provisions of the United States Constitution and Code set forth in the Petition, p.2-3, the following provisions are set forth in relevant part:

First Amendment:

> Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.

Article 1 §9, Clause 2. Suspension of habeas corpus.

> The Privilege of the Writ of Habeas Corpus shall not be a suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

28 U.S.C. §753(b)

> One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of the court or by one of the judges, and shall record verbatim by shorthand or by mechanical means . . . (1) all proceedings in criminal cases had in open court; . . . (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court or as may be requested by any party to the proceeding.

28 U.S.C. §1915(b)

> In any civil or criminal case the court may, upon the filing of a like affidavit, direct that the expense of printing the record on appeal, if such printing is required by the appellate court, be paid by the United States, and the same shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

STATEMENT

Petitioner's statement accurately summarizes the history of the proceedings below. Additional relevant facts include the following:

Respondent is a poorly educated, white male without formal education in the law. Respondent was convicted in a criminal trial on June 4, 1970. Respondent was represented by a court appointed attorney during these trial proceedings. According to Respondent, his appointed counsel did virtually no preparation for or participation in the trial and advised Respondent not to appeal his conviction "because it would interfere with Respondent's motion to modify sentence." Respondent was held in custody from the date of arrest until his release on parole last year.

During his period of incarceration following trial, Respondent was held in maximum security within the McNeil Island Federal Penitentiary and then transferred to Leavenworth, Kansas. The collateral proceedings which are before this Court were all begun while Respondent was "in the hole" at Leavenworth. Respondent was assisted in the early stages of litigation by the University of Kansas Law School Prison Project. Respondent, partially as a result of his confinement in these conditions, was unable to clearly recall the trial events other than his lack of advice or contact with his court appointed attorney. Petitioner had no trial notes of the proceedings and his court appointed trial attorney was unavailable for consultation.

The District Court, following the filing of the Complaint by Respondent, on June 23, 1972, granted the governments motion to dismiss "for failure to state a claim on which relief can be granted" on January 12, 1973. At the time of dismissal, the following facts as plead by Respondent were accepted by the District Court as true for the purposes of the Government's motion:

(1) Appellant is indigent (Record p. 2,4).

(2) Appellant's belief that the sought for transcript would assist him in preparation of his §2255 proceeding by revealing lack of effective assistance of counsel at trial and insufficiency of the evidence to sustain appellant's conviction, was a good faith belief and not frivolous (Record p. 4-5).

(3) Appellant had no effective alternative to the transcript since his memory, personal notes, etc., were inadequate to provide the requisite information (Record p. 5).

At all times, the preceding facts as plead by Respondent were assumed to be true by the court below in order to rule upon the government's motion to dismiss and for the issues to be reviewed by the Ninth Circuit and this Court.

ARGUMENT

The issue in the present case is a somewhat narrower one than asserted in the government's petition for certiorari and does not warrant review by this Court since the decision below is consistent with the prior holdings of this Court and the statutory scheme established by Congress. The actual issues litigated in this case are not inconsistent with decisions of other lower courts and are distinguishable from the cases asserted in the Petition. There is no important issue of judicial administration created by the holding below.

I. The Decision Below Is Narrow In Scope

The decision of the Ninth Circuit was limited by its language to an indigent federal prisoner who did not appeal his original trial conviction and who has been allowed to proceed in forma pauperis pursuant to 28 U.S.C. §1915 in processing his 28 U.S.C. §2255 application. The decision is further limited by

the factual context in which Respondent asserted his right to a transcript i.e., where the asserted grounds of error at trial are incompetence of counsel and lack of sufficiency of the evidence, each requiring a transcript to be properly argued and presented for review.

Although the broader issue of an unlimited right of transcript for indigent prisoners was argued by each side and discussed by the Ninth Circuit, the actual holding of the case does not reach this question.

II. The Decision Below Is Not Inconsistent With Other Lower Court Authority.

Petitioner has cited six Courts of Appeals with allegedly conflicting decisions:

> Six other courts of appeals have addressed the issue in federal cases. See Benthiem v. United States, 403 F.2d 1009 (C.A. 1), certiorari denied, 396 U.S. 945; United States v. Shoaf, 341 F.2d 832 (C.A. 4); Cowan v. United States, 445 F.2d 855 (C.A. 5); Bentley v. United States, 431 F.2d 250 (C.A. 6), certiorari denied, 401 U.S. 920; Culbert v. United States, 325 F.2d 920 (C.A. 8); Martinez v. United States, 344 F.2d 325 (C.A. 10).

The cases are distinguishable from Respondent's and are not in conflict.

Without exception, all of the cases cited are pre - Britt v. North Carolina, 404 U.S. 226 (1971), the most recent decision of this Court which specifically reserved the broader question asserted by Petitioner. Petitioner has cited no post-Britt case which is in conflict with the opinion of the Ninth Circuit.

In the First Circuit Case cited by Petitioner, Benthiem, supra, the petitioner therein filed a §2255 motion prior to the application for a transcript. A full hearing on said motion was had and the application for a transcript was made after the hearing on the merits had been concluded. At the hearing, where the only asserted error was the lack of assistance of counsel at trial, the reviewing court had before it an affidavit of the original trial counsel setting forth his efforts on

Petitioner's behalf, a government memo attesting to the competence of the trial attorney, and a concurrence by the appointed counsel for the petitioner that the original trial lawyer had not been incompetent.

Respondent herein, did not have such a hearing, no record of the frivolity of his assignments of error existed and the opposite was taken as true by the court in order for the motion to dismiss to be ruled upon. In other words, there was no record before the Court herein for dismissal of the underlying §2255 proceeding as there was in Benthiem which justified the conclusion that a transcript would not be of assistance to the petitioner therein.

In the Second Circuit case cited by Petitioner, U.S. v. Carella, supra, the facts are radically different from Respondent herein. In Carella, the issue was not availability of a transcript of a trial to aid in post-conviction relief proceedings, but rather a complete transcript of a prior mistrial to aid in preparation for a second trial. Carella asserted that he needed the transcript to aid him in cross-examination of government witnesses. In lieu of this complete transcript, Carella had been given a partial transcript including all of the prosecution's direct witnesses testimony and had available trial counsel's notes of all testimony, grand jury testimony and §3500 statements of witnesses. No allegation of need for the complete transcript was presented. Respondent herein, however, had none of these alternatives available and was seeking the transcript not for some hypothetical purpose but specifically for the preparation of his §2255 proceeding.

The Fourth Circuit Case of U.S. v. Glass, supra is not in conflict since Glass had plead guilty to the original charges and the basis of his §2255 proceeding was not trial error but

promises made to induce the guilty plea. No allegation of the necessity of the transcript to aid in presentation of this issue was made. Further, the district court in Glass did not rule upon the in forma pauperis application of Glass. The Fourth Circuit simply noted this apparent lack of necessity and remanded the case for a determination of the merits of the §2255 claim. Respondent herein, however, has alleged his good faith belief that his transcript is necessary for the preparation of his non-frivolous claims of error and no alternative source is available to him. Respondent's in forma pauperis application was ruled upon thereby determining the lack of frivolity of the claim. The decision below is not in conflict with Glass, supra.

Similarly, in U.S. v. Schoaf, supra, no allegation of error at trial was contained in the petitioner's request for transcript. The Fourth Circuit remanded for a determination of the necessity of a transcript since the lack of error alleged by Schoaf did not make it clear whether a transcript was appropriate. Respondent herein has alleged that this error which is in good faith asserts, can only be determined with the aid of a transcript. Schoaf is not only pre - Britt but precedes most of the case law development on right to transcript. See opinion below p. 3-10.

The Fifth Circuit case cited by Petitioner, Cowan v. U.S., supra, is a per curiam opinion without discussion of the facts or law applied other than to string cite earlier authority which, as does Cowan predates Britt and apparently is no different than those cases discussed, supra in other circuits. (See Skinner v. U.S., 434 F.2d 1036 (1970) a blanket assertion by the Petitioner of an absolute right to a transcript without any alleged error noted.) Respondent herein has alleged error and the necessity of the transcript for such error.

The Fifth Circuit case is also greatly different from Respondent's herein and not in conflict. In Bentley v. U.S., supra, the Sixth Circuit denied a request for transcript in a post-conviction relief motion where there had been an appeal taken from the original trial and stipulated facts and issues in lieu of a transcript had been agreed upon. In the subsequent post-conviction relief request for transcript by Bentley, no allegation of error was contained which indicated a need for a transcript rather than the original stipulation. Again, Respondent's factual setting and allegations are not on point.

Similarly, in the Eighth Circuit case cited by Petitioner, Culbert v. U.S., supra, the alleged error was limited solely to the asserted incompetency of counsel at trial and the request for a transcript occurred after the denial of the §2255 application on the merits. In other words, unlike Respondent herein, a litigation of the frivolity of the alleged error occurred prior to the request for transcript. The Eighth Circuit opinion relied heavily on U.S. v. Glass, supra, discussed supra.

Lastly, the 10th Circuit case cited by Petitioner, Martinez v. U.S., supra, recites that the alleged errors asserted by the Martinez "defy intelligent analysis." No further discussion of the allegations or relevancy of a transcript is made. Apparently this request for a transcript in the collateral proceeding was made only on appeal from the denial of the §2255 motion and was asserted as a general right. Respondent, herein asserted both specific error for which the transcript was required and requested the transcript prior to the district court ruling on the §2255 application.

The actual and narrow holding of the Ninth Circuit is not in conflict with the specific holdings of the other circuits cited by Petitioner. Rather, the only conflict is in the degree of showing of necessity required for production of a transcript. The

opinion below simply asserts that an adequate showing under Wade v. Wilson, 396 U.S. 282 (1970) and Britt v. North Carolina, supra, is accomplished where a good faith assertion of trial error is made, the District Court makes the §1915 certification of non-frivolity, and the petitioner is indigent. Petitioner submits that such a holding is consistent with the Wade and Britt decisions which are the latest statements by the Court and which post-date the case law relied upon by Petitioner.

III. There Is No Important Issue Of Administration of Justice

Petitioner asserts that the availability of transcripts should be uniform throughout the federal system and that the effect of the opionion below will be to open the floodgates of frivolous applications for transcripts of trials and further aggravate the load of the court reporters and burden the administration of justice with additional expenses.

As the opinion below notes, the present policy of Britt and Wade leaves the determination of necessity for a transcript to the lower courts on a case by case factual analysis. Neither the opinion below nor the Petitioner suggest any change in this procedure. The actual number of potential litigants in Respondent's position is probably quite small (See Opinion below pages 17-19), and actual cost or increase in burden very difficult to predict. As the opinion below points out (Op. p. 18), the present cost of litigating entitlement to transcript is more costly to the government (when it occurs) than the simple preparation of the transcript in many if not most cases.

Since the ruling below is confined to the small class of litigants who did not plead guilty, but went to trial and then failed to appeal, who can point to alleged error and who have

passed a frivolity screening process pursuant to §1915, its impact upon the present structure is slight at best. Indeed, by minimizing subsequent frivolous §2255 applications and hearings, the decision below may be seen as an appropriate apportionment of judicial resources.

Since the Opinion below is not inconsistent with the approach followed in other jurisdictions but is slightly more precise in establishing a rule for transcripts, it seems hard to argue that any great disparity in access to transcripts for indigent prisoners will result. Each case still requires a showing of non-frivolity and necessity consistent with Wade and Britt and accordingly, as discussed in detail supra §II, the apparent conflict between circuits asserted by Petitioner and the attendant lack of uniformity is largely illusory.

IV. The Decision Below Was Correct

Respondent will not reargue the merits of his position below. The Opinion below adequately addresses the dilemma of the narrow class of litigants represented by Respondent and the Opinion's analysis is complete.

Respondent does wish to call the Court's attention to the substantial constitutional issues which would have been raised had the majority below not interpreted the statutory and constitutional scheme as it did. The inter-relationship of 28 U.S.C. 753, 28 U.S.C. 1915 and 28 U.S.C. 2255, can conflict with Article I §9 Cl. 2, if interpreted to provide a lesser remedy than habeas corpus for federal prisoners or to limit access for such relief.

Additionally, if the statutory scheme were interpreted differently, First Amendment rights to petition for redress of grievances might be infringed; United Mineworkers v. Illinois State Bar Association, 309 U.S. 217 (1967), and substantial due

process issues would have been confronted, Wade v. Wilson, supra, and Griffin v. Illinois, 351 U.S. 12 (1955), see also The Indigent's Right to a Transcript of Record, 20 Kan. L.Rev. 746 (1972) and Allowance of In Forma Pauperis Appeals in §2255 and Habeas Corpus Cases, 43 F.R.D. 343 (1967).

The Opinion below is an adequate and reasonable refinement of the issues in Britt and Wade which does not require further review by the Court. Since the broader issue reserved by Britt and Wade is not presented by the narrow holding of the Opinion below because of the statutory interpretation followed, no issue of substantial federal import is presented herein.

V. Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

Respectfully Sumbitted,

John A. Strait
Attorney for Respondent

July 23, 1975

Supreme Court, U. S.
FILED
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No. 74-1487

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

COLIN F. MACCOLLOM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–22a) and the dissent from the denial of rehearing *en banc* (Pet. App. 23a–28a) are reported at 511 F. 2d 1116. The order of the district court (Pet. App. 30a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 29a) was entered on August 2, 1974. The government's timely petition for rehearing and suggestion of rehearing *en banc* was denied on February 26, 1975 (Pet. App. 23a–24a). The petition for a writ of certiorari was filed on May 27, 1975, and was granted on

in Forma Pauperis" (App. 6–7). At the direction of the Chief Judge, the clerk of the court returned the "Motion" to respondent and informed him that, until respondent filed a motion pursuant to 28 U.S.C. 2255, the district court had no power to act upon his request for a transcript (App. 10).

On June 23, 1972, respondent, still appearing *pro se*, filed a document entitled "Complaint for Declaratory Judgment and Injunctive Relief" (App. 11–13).[1] He alleged that he "intends to move this Court for vacation of his sentence pursuant to 28 U.S.C. § 2255," that because of his poverty he was unable to purchase a transcript of his trial, and that he believed that the transcript would show that he had not been afforded effective assistance of counsel and that there was insufficient evidence to support the verdict of guilty. The complaint also alleged that without a transcript respondent would be "unable to frame his arguments for fair and effective review" (App. 12); it contended that his inability to obtain a transcript therefore de-

[1] The complaint alleged jurisdiction under 28 U.S.C. 2201 (the declaratory judgment statute) and 28 U.S.C. 1391(e). Neither statute is a grant of jurisdiction; Section 1391(e) is a venue provision, and the declaratory judgment statute simply establishes a remedy available in cases for which there is an independent source of federal jurisdiction. See, *e.g.*, *Schilling* v. *Rogers*, 363 U.S. 666, 677; *Skelly Oil Co.* v. *Phillips Co.*, 339 U.S. 667, 671.

Neither the district court nor the court of appeals discussed the problem of jurisdiction over respondent's complaint. We believe, however, that there is jurisdiction pursuant to 28 U.S.C. 2255; respondent has alleged that he is entitled to release from custody, and the request for a transcript may properly be viewed as ancillary to an underlying (albeit as yet unfiled) Section 2255 action.

prived him of due process of law.[2] The complaint did not state why respondent believed counsel had been inadequate or the evidence insufficient, nor did respondent advance any reason—other than his bare assertion—to believe that the transcript would provide support for his contentions.

After respondent had filed his complaint, the district court granted him leave to proceed *in forma pauperis*. Counsel was appointed and represented him at a hearing in the district court on January 12, 1973 (App. 3–4). After that hearing, the district court entered an order dismissing the complaint for failure to state a claim upon which relief could be granted (Pet. App. 30a). Respondent appealed. During oral argument in the court of appeals, respondent's counsel "candidly argued that he cannot represent to the court that specific constitutional grounds for relief exist until after he has seen a transcript" (Pet. App. 2a).

A divided panel of the court of appeals reversed, holding that "an indigent federal prisoner, permitted to proceed *in forma pauperis*, * * * is entitled to * * * a [verbatim] transcript, upon request in order to assist him in the preparation of a postconviction

[2] Respondent also alleged that 28 U.S.C. 753(b) and 1915(b) entitled him to a transcript. However, Section 753(b) simply establishes the manner in which notes and recordings of courtroom proceedings are to be made, and Section 1915(b) excuses an individual who has been permitted to proceed *in forma pauperis* from paying for reproduction of the record on appeal. Neither section authorizes the provision of trial transcripts without cost, and the court of appeals did not rely upon them.

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motion under 28 U.S.C. § 2255" (Pet. App. 19a; footnote omitted). The court rejected the government's argument that an indigent prisoner[3] should be required to make a colorable claim that the transcript would be necessary to establish facts that would make out an arguably meritorious contention of entitlement to collateral relief. It concluded, instead, that because the Constitution requires the government to provide transcripts on direct appeal, it creates an identical entitlement for purposes of collateral attack.[4]

With five judges registering their dissents, the court of appeals rejected the government's suggestion for an *en banc* rehearing. Judge Wallace, writing for the dissenters, pointed out that although "justice should not be determined by the size of a pocketbook, an indigent is not entitled to any more than an average defendant who is able to pay his own way" (Pet. App. 24a). Because such an average defendant, who had not taken an appeal, would be unlikely to expend his resources on a transcript unless he believed that it

[3] Respondent was incarcerated at the time of the court's decision. He has since been paroled. This case is not moot, however, because an individual on parole is still "in custody" for purposes of collateral relief. *Jones* v. *Cunningham*, 371 U.S. 236; cf. *Hensley* v. *Municipal Court*, 411 U.S. 345.

[4] The court limited its holding to cases in which a federal *prisoner* seeks a transcript, reserving the question whether a convicted person who seeks a transcript only after his release from prison is equally entitled to a transcript (Pet. App. 19a, n. 9). But respondent himself is not a "prisoner." Moreover, so long as the convicted person is on parole, he is "in custody" (see n. 3, *supra*), and we see no valid basis for denying him the same preparatory aid for collateral attack that the court deemed constitutionally necessary in the case of prisoners. Cf. *Lane* v. *Brown*, 372 U.S. 477.

would reveal facts necessary and likely to establish his claim for relief, Judge Wallace argued that the government is under no obligation to provide a free transcript to an indigent prisoner unless that prisoner can make a comparable showing.

SUMMARY OF ARGUMENT

With the single exception of the court of appeals in this case, every federal court that has considered the question has held that a prisoner, seeking a transcript of his trial in order to peruse that transcript for errors upon which to base a collateral attack, must either pay for the transcript he seeks or demonstrate that the transcript is necessary to support an arguably meritorious claim for relief. The court of appeals thought this rule inconsistent with recent cases of this Court.

The premise of the court of appeals is that, once an avenue of judicial review has been created, that review must be available to the destitute and to the "wealthy" upon an absolutely equal basis. Because the "wealthy" are allowed to purchase trial transcripts without demonstrating a "need" for them or potential merit to their claims, the court reasoned that the indigent prisoner must be given a trial transcript without charge. We think that the court of appeals' analysis fails because this Court has not established a rule of absolute equality, but has instead required only that the indigent be afforded a fair opportunity for effective review. Respondent has been afforded such an opportunity. He could have appealed and

received a trial transcript, which later would have been available for use on collateral attack. Failing that, he could have attempted to demonstrate a need for the transcript he seeks.

A. In a series of cases involving indigents who asserted that they were unable to purchase transcripts, this Court has made it clear that once a government creates a right to judicial review, it cannot erect barriers that preclude its effective exercise by indigents. The rationale of these cases is that the government must afford indigents the same "practical opportunity for review" that is available to those who can pay for transcripts. *Griffin* v. *Illinois,* 351 U.S. 12, 23 (Frankfurter, J., concurring). The difficult task faced in each case is giving meaning to the abstract requirement that indigents must have "adequate and effective" means of review. *Lane* v. *Brown,* 372 U.S. 477, 483. In some types of cases this may mean that transcripts should be provided as of course, but in others an indigent can obtain effective and fair review by using informal substitutes for a transcript, and in others no transcript at all will be needed, either because the claim can be resolved without a transcript or because there is no colorable claim.

Ross v. Moffitt, 417 U.S. 600, summarized many of the considerations that had informed *Griffin* and the other transcript cases. The Court held that absolute equality between indigents and those who can afford to pay is not required by the Constitution. The fact that a particular service might conceivably "be of

benefit to an indigent defendant does not mean that the service is constitutionally required" (417 U.S. at 616). What is required in some forms of proceedings may not be required in others. What was necessary on direct appeal was held to be not constitutionally required in subsequent proceedings. Here, where respondent bypassed his right to appeal, analogous limitations apply.

B. Respondent has had the "adequate opportunity to present his claims fairly" (*Ross, supra,* 417 U.S. at 616) that the Constitution requires. He could have appealed his conviction, and he has not alleged that he did not know of this opportunity. Had he done so, he would have been entitled to a trial transcript of sufficient completeness to enable him to present any claim of error he chose. If his appeal had been unsuccessful, he would have been entitled to receive a copy of the already-prepared transcript for use in seeking collateral relief. Respondent's current "difficulties" stem not from his poverty but from his own decision not to appeal his conviction.

It is true that indigent defendants are differently situated from non-indigents if they bypass their opportunity to appeal. But there are good reasons for introducing incentives to take appeals; an appeal leads to speedy resolution of claims of error and, if there is error, to a retrial before evidence has dissipated and memories faded.

Moreover, the very fact that a defendant who chose not to appeal later contends that his trial was infected with error suggests that something has hap-

pened in the interim to make him change his mind about the merits of his case. It suggests, in other words, that the defendant has recalled or become aware of something that he thinks might entitle him to relief. We see no constitutional flaw in requiring him to relate this as a precondition to receiving a transcript—in many instances the court would be able to order a partial transcript prepared or rule that the allegations, even if true, do not establish an entitlement to relief.

C. This argument is reinforced by the different standards of review that govern claims made on appeal and those made collaterally. It is an established rule that the writ of *habeas corpus* and its federal counterpart, 28 U.S.C. 2255, "will not be allowed to do service for an appeal" (*Sunal* v. *Large,* 332 U.S. 174, 178). Most of the errors that might occur at trial (and therefore would be reflected in a trial transcript) must be presented on appeal or not at all. By contrast, the grounds for collateral attack—if supported by any documents—usually are revealed in documents other than the trial transcript. We submit that Congress was entitled to conclude that a prisoner who bypasses his appeal should be required to demonstrate some need for a trial transcript and some probability that the transcript would support a claim cognizable on collateral review. Congress has done no more than require the prisoner to demonstrate that he falls within the exception rather than the rule.

Indeed, it seems fair to say that the requirements Congress has imposed in 28 U.S.C. 753(f) are necessary to achieve rough equality between the indigent

and a prisoner of average means who could, with some sacrifice, pay for a trial transcript. The prisoner of average means, acquainted with the extraordinarily narrow scope of collateral review, would inquire of himself whether he needed a transcript to support a colorable claim; a prisoner of average mears would be willing to pay for a trial transcript (and forego what his money otherwise could buy) only if he believed the transcript would be useful to him. Section 735(f) directs to the indigent prisoner the same questions that a prisoner of average means would direct to himself before spending money for a trial transcript. We submit that this process is not so fundamentally unfair to the indigent prisoner that it denies him due process of law. If he can satisfy the requirements of Section 753(f), a transcript will be furnished without charge. If he cannot satisfy the standards of that section, it is most unlikely that he could establish an entitlement to collateral relief even with the aid of a transcript.

D. The major function served by Section 753(f) is to permit the district courts to sift frivolous cases from those deserving a greater call upon the limited resources of the courts and court reporters. The process created by Section 753(f) substantially duplicates the process by which district courts approve appeals *in forma pauperis*—a process that has been interpreted and upheld in *Coppedge* v. *United States,* 369 U.S. 438. In the absence of such a screening device, requests for transcripts to be used only for perusal in the hope of finding an error would require many

hours of court reporters' time—time that otherwise could be devoted to speedier transcription of materials necessary for appeals and for arguably meritorious collateral attacks. We do not argue that the drain upon judicial and reportorial resources is a good reason for denying trial transcripts altogether; that would be too high a price to pay. But the practical requirements involved in the provision of trial transcripts many years after the trial has ended provide strong support for Congress' judgment that a prisoner must either pay for what he seeks or demonstrate some need for it.

ARGUMENT

AN INDIGENT PRISONER WHO DID NOT APPEAL HIS CONVICTION IS ENTITLED TO A VERBATIM TRANSCRIPT OF HIS TRIAL ONLY IF HE CAN DEMONSTRATE THAT A TRANSCRIPT IS NECESSARY TO SUPPORT A NONFRIVOLOUS ATTACK ON HIS CONVICTION OR SENTENCE

This case presents a question pretermitted by this Court in *Wade* v. *Wilson*, 396 U.S. 282, 286—whether "the Constitution requires that [the federal government] furnish an indigent * * * prisoner free of cost a trial transcript to aid him to prepare a petition for collateral relief." Seven courts of appeals, and district courts in two other circuits, have addressed this question; the instant decision stands alone in holding that a prisoner has an unconditional constitutional [5]

[5] The court of appeals relied solely upon constitutional grounds for its holding; it did not find that respondent's allegations established either a need for a transcript or a probability that the transcript would be relevant to a nonfrivolous claim.

right to a transcript for the purpose of searching it in the hope of discovering errors.[6] We demonstrate that it is not unfair to require a prisoner to pay for a transcript in the absence of any showing of a colorable need for one to support an arguably meritorious claim, when the prisoner had, but did not use, an opportunity to appeal his conviction.

A. THE CONSTITUTION IS SATISFIED WHEN AN INDIGENT DEFENDANT IS AFFORDED A FAIR OPPORTUNITY TO HAVE HIS CLAIMS ADJUDICATED

28 U.S.C. 1915(a) provides that a district court may allow an indigent to seek collateral relief without prepayment of fees or costs. 28 U.S.C. 753(f) provides that once the court has done so a transcript of the trial will be provided "if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented * * *." The court of appeals in effect held Section 753(f) unconstitutional by holding that an indigent is constitutionally entitled to a transcript to peruse for error, whether or not there has been a dem-

[6] See *Benthiem* v. *United States*, 403 F. 2d 1009 (C.A. 1); *United States* v. *Shoaf*, 341 F. 2d 832 (C.A. 4); *United States* v. *Herrera*, 474 F. 2d 1049 (C.A. 5), certiorari denied, 414 U.S. 861; *Bentley* v. *United States*, 431 F. 2d 250 (C.A. 6), certiorari denied, 401 U.S. 920; *Culbert* v. *United States*, 325 F. 2d 920 (C.A. 8); *Martinez* v. *United States*, 344 F. 2d 325 (C.A. 10); *Gibbs* v. *United States*, 346 F. Supp. 1237 (E.D. Pa.); *Poe* v. *United States*, 229 F. Supp. 6 (D.D.C.).

Five of these courts have reached the same conclusion in state *habeas corpus* cases. See *Ellis* v. *Maine*, 448 F. 2d 1325 (C.A. 1); *Jones* v. *Superintendent*, 460 F. 2d 150 (C.A. 4), certiorari denied, 410 U.S. 944; *Bonner* v. *Henderson*, 517 F. 2d 135 (C.A. 5); *Chavez* v. *Sigler*, 438 F. 2d 890 (C.A. 8); *Hines* v. *Baker*, 422 F. 2d 1002 (C.A. 10).

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onstration of need and lack of frivolity.[7] This result, it stated, was required by cases holding that States cannot deny to indigent defendants whatever hearings and appeals it has made available to the wealthy. We submit, however, that this Court's decisions do not establish for indigents a right equal to that of the "wealthy," as the court of appeals supposed, to procure transcripts without a showing of need. Nor do this Court's cases create for indigents a right, not shared even by the "wealthy," to receive a trial transcript without any cost or effort on their own part. They hold only that an indigent defendant is entitled to a *fair* opportunity to have his claims adjudicated.

In a series of cases involving indigents who asserted that they were unable to pay filing fees or the cost of transcripts, this Court has made it clear that once a government creates a right to judicial review, it cannot erect barriers that preclude its effective exercise by indigents. See, *e.g.*, *Griffin* v. *Illinois*, 351 U.S. 12; *Draper* v. *Washington*, 372 U.S. 487; *Lane* v. *Brown*, 372 U.S. 477; *Coppedge* v. *United States*, 369 U.S. 438, 446. The central theme running through the cases is that the government must afford indigents the same "practical opportunity for review" of their criminal convictions (*Griffin, supra*, 351 U.S. at 23; Frankfurter, J., concurring) that is available to other defendants. A government "with an appellate system which [makes] available trial transcripts to those who [can] afford them [is] constitutionally required

[7] The court wrote that it was "fill[ing] a constitutional deficit not addressed by the statute" (Pet. App. 9a).

to provide 'means of affording adequate and effective appellate review to indigent defendants' " (*Lane* v. *Brown, supra*, 372 U.S. at 483, quoting from *Griffin, supra*, 351 U.S. at 20).[8] The same principle applies to appellate review of collateral attacks.[9]

The critical question here, as in the other cases, is the definition of "adequate and effective" review. The Court has held that "adequate and effective" review is available even when the government does not provide the indigent with every legal tool available to a defendant who can afford it. "Adequate and effective" review is a "practical" standard, for "[t]he question is not one of absolutes, but one of degrees" (*Ross* v. *Moffitt*, 417 U.S. 600, 612).

[8] In direct appeal cases after *Griffin*, the Court invalidated state practices conditioning the availability of a transcript on the trial judge's finding that an indigent's appeal was not frivolous (*Draper* v. *Washington*, 372 U.S. 487) or automatically denying transcripts to indigents appealing from convictions for "quasi-criminal" violations (*Williams* v. *Oklahoma City*, 395 U.S. 458) or misdemeanors (*Mayer* v. *City of Chicago*, 404 U.S. 189).

[9] In *Burns* v. *Ohio*, 360 U.S. 252, the Court held invalid a rule requiring payment of a filing fee to obtain discretionary review in the State's highest court. In *Smith* v. *Bennett*, 365 U.S. 708, it found defective an identical barrier to the right to petition for *habeas corpus*. In *Lane* v. *Brown*, 372 U.S. 477, the Court struck down a law leaving to the discretion of the Public Defender the decision to order a transcript of a preliminary hearing, when the transcript was necessary to confer jurisdiction on the State's supreme court to hear an appeal from a dismissal of *coram nobis* proceedings. And in *Long* v. *District Court of Iowa*, 385 U.S. 192, the Court declared unconstitutional a state rule that denied an indigent a transcript of his *habeas corpus* hearing, when a transcript was "available and could easily have been furnished" (*id.* at 195).

> [T]he fact that a particular service might be of of benefit to an indigent defendant does not mean that the service is constitutionally required. The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly * * *. [*Id.* at 616.]

Ross is the most recent clarification of the Court's approach, summarizing principles that had long predominated. For example, in *Griffin* the Court invalidated a state rule that effectively "decreed that only defendants who can afford to pay for the stenographic minutes of a trial may have trial errors reviewed on appeal" (351 U.S. at 22, Frankfurter, J., concurring); but at the same time it was recognized that the State need not provide a transcript on demand if "other means" afford adequate opportunity for review (*id.* at 20).[10] In *Eskridge* v. *Washington,* 357 U.S. 214, 216, the Court observed: "We do not hold that a State must furnish a transcript in every case involving an indigent defendant." In *Draper* v. *Washington, supra* 372 U.S. at 495, the Court wrote that "part or all of the stenographic transcript in certain cases will not be germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily

[10] In *Burns* v. *Ohio*, 360 U.S. 252, n. 11, after quoting *Griffin's* conclusion that "[w]e are confident that the State will provide corrective rules to meet the problem which this case lays bare," the Court noted that Illinois had subsequently changed its rules to make a transcript available to an indigent when "necessary to present fully the errors recited in the petition * * *."

in such circumstances." And in *Britt* v. *North Carolina,* 404 U.S. 226, 230, the Court indicated that a transcript is unnecessary if the defendant has available an "informal alternative" that is substantially equivalent to a transcript.

We do not suggest that the Court should take a restrictive view of the need for transcripts in the modern system of criminal justice. Nor has the Court done so. Its cases have decreed a "flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way." *Mayer* v. *City of Chicago,* 404 U.S., 189, 196–197. We argue only that fair access to judicial review for indigents can be achieved in many ways, and the Court has followed no unyielding practice, but has instead adopted an elastic approach keyed to the avenue of review and the demonstrated needs of particular litigants.

This pragmatic approach has led the Court to isolate a few situations in which indigent defendants must be afforded transcripts without a particularized showing of need. The transcript of a preliminary hearing (*Roberts* v. *LaVallee,* 389 U.S. 40) or of a previous mistrial (*Britt* v. *North Carolina, supra*) can be obtained without such a showing, so long as no functional alternative is available.[11] Similarly, a federal

[11] In *Roberts* the Court "found it unnecessary to discuss the question" (see *Britt* v. *North Carolina, supra,* 404 U.S. at 228, n. 3) whether a particular need must be shown. The Court stated, however, that "[o]ur decisions for more than a decade now have made clear that differences in access to the instruments *needed* to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution" (389 U.S. at 42; emphasis added).

defendant seeking to take a direct appeal *in forma pauperis* is entitled to "a record of sufficient completeness" to enable him to attempt to show that his appeal would not be frivolous (*Coppedge* v. *United States, supra,* 369 U.S. at 446). And "where counsel on appeal was not counsel at the trial," the defendant is entitled to a verbatim transcript without any further showing of need (*Hardy* v. *United States,* 375 U.S. 277, 282).

In other situations the Court has declined to establish an inflexible constitutional rule that would provide an indigent with a full transcript of his trial without a colorable showing that it is necessary for an effective appeal. For example, in *Mayer, supra,* the Court observed that the government "must provide a full verbatim record where that is necessary to assure the indigent as effective an appeal as would be available to the defendant with resources to pay his own way" (*id.* at 195). But it also observed that "[a] 'record of sufficient completeness' does not translate automatically into a complete verbatim transcript" (*id.* at 194). "[W]here the grounds of appeal * * * make out *a colorable need* for a complete transcript, the burden is on the State to show that only a portion of the transcript or an 'alternative' will suffice for an effective appeal on those grounds" (*id.* at 195; emphasis added).

Ross v. *Moffitt, supra,* held that an indigent defendant, who is constitutionally entitled to appointed counsel on direct appeal (*Douglas* v. *California,* 372

U.S. 353), does not possess the same entitlement when relief is discretionary. *Ross* demonstrates that the test of an indigent's right to a particular legal service is whether that service is necessary to an "adequate opportunity to present his claims fairly" (417 U.S. at 616), and that the inquiry into whether he has received such an opportunity must take account of the nature of his claim. (See Part C, *infra.*) The fact that a particular service might conceivably "be of benefit to an indigent defendant does not mean that the service is constitutionally required" (*ibid.*). Thus, in *Ross,* what was necessary on direct appeal was held to be not constitutionally required in subsequent proceedings."[12]

B. AN INDIGENT DEFENDANT HAS A FAIR OPPORTUNITY TO HAVE HIS CLAIMS RESOLVED BY TAKING AN APPEAL

Respondent has had the "adequate opportunity to present his claims fairly" (*Ross, supra,* 417 U.S. at 616) that the Due Process Clause of the Fifth Amendment demands. He could have appealed his conviction, for he "no doubt was advised by the trial court of his right to [appeal] and knew he could exercise such right" (Pet. App. 22a; Taylor, J., dissenting). But respondent and his trial counsel chose not to appeal.

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[12] *Ross* relied in part upon the fact that the indigent had received the services of an attorney on direct appeal. Although respondent did not receive similar services, he was entitled to them. He has not been deprived of such assistance on account of his indigence, but on account of his decision not to appeal. And, of course, respondent has been represented by counsel in his attempt to obtain a trial transcript.

Respondent has not alleged that he desired to appeal but was frustrated by his attorney or that his attorney failed properly to counsel him concerning his right to appeal—matters on which the transcript respondent seeks would shed no light. If respondent had appealed, he could have obtained a full transcript of his trial.[13] And if he had been unsuccessful on his appeal and had sought collateral relief, his attorney or the government would have provided him with a copy of the transcript that already had been prepared. See 28 U.S.C. 2250. In short, respondent's current difficulties stem from his own decision not to appeal his conviction. He has not been denied effective judicial review—either on appeal or on collateral review—on account of his indigence.

[13] As an indigent, respondent was represented at trial, and was entitled to representation on appeal, by an attorney appointed under the Criminal Justice Act (18 U.S.C. 3006A). 28 U.S.C. 753 (f) provides that fees for transcripts for individuals represented on appeal under the Criminal Justice Act "shall be paid by the United States."

Under the standards of *Coppedge*, *supra*, respondent automatically would have received "a record of sufficient completeness" to enable him to demonstrate that his appeal was not frivolous. If either the district court or the court of appeals agreed with respondent that his appeal was not frivolous, the court of appeals would have considered his appeal "in the same manner" as a paid appeal, and his counsel could have obtained, at government expense, whatever portions of the transcript may have been relevant to his claims on appeal. In most cases a full transcript is prepared. Had respondent been represented by new counsel on appeal he would have been entitled to a full transcript even to make the threshold demonstration of nonfrivolous grounds for appeal. *Hardy* v. *United States*, *supra*.

Respondent's entitlement to a transcript on appeal provided him a fair opportunity to present his claims as fully as he desired. It seems likely that, if respondent or his counsel had believed that meritorious grounds for reversal were present, respondent would have appealed. While the readier availability of a transcript on a direct appeal may encourage indigents to take such appeals, this effect is consistent with sound judicial administration. If an appeal were taken immediately, a defendant and his counsel would be more likely to remember the trial and the incidents during the trial that might be grounds for reversal; consequently, they would be able to cooperate with the prosecutor in designating portions of the record that would avoid the necessity of full reproduction and consequent waste of court reporters' time.[14] Moreover, if there are errors in a trial, reversal and immediate retrial is vastly preferable to successful collateral attack and a retrial years later when memories have dimmed and the evidence on both sides has dissipated.

What is more, if a defendant who elected not to appeal later petitions for collateral relief, it seems most likely that the change of heart would have been caused by some intervening event—perhaps a change in the law, perhaps the sudden remembrance of an event at trial that had been overlooked when the initial decision not to appeal had been made. It is

[14] Cf. *United States* v. *Schmitz*, C.A. 9, No. 75-2056, decided August 5, 1975 (Chambers, C. J., in chambers).

not unfair for Congress to require a defendant who changes his mind in this fashion to state the reasons for the change. That statement of reasons would enable the district court to ascertain whether the indigent prisoner needs a transcript in order to make a nonfrivolous claim for collateral relief.

We think this argument addresses and satisfactorily answers a recurring theme in this Court's transcript cases—that it is unfair to require an indigent defendant to rely upon memory alone when the more affluent can supplement their memories with transcripts. For example, in *Gardner* v. *California,* 393 U.S. 367, 369, the Court held that it would be unfair to require an indigent defendant to "draw on his memory [of a prior hearing] in preparing his application" for collateral relief, where the State court required him to show that the prior hearing was inadequate. And in *Britt, supra,* 404 U.S. at 229, the Court wrote: "We have repeatedly rejected the suggestion that in order to render effective assistance, counsel must have a perfect memory or keep exhaustive notes of the testimony given at trial." The court of appeals reiterated this theme, arguing that Section 753(f) "requires an imprisoned indigent to remember constitutional deficiencies and to relate them to an attorney or directly to the court, neither of whom may have had any previous contact with the prisoner or his trial * * * [W]e do not read the Supreme Court's opinions nor the Constitution itself

to require paupers to have better memories than the affluent" (Pet. App. 14a–15a). It would, indeed, be unfair if an indigent defendant were required to rely soley upon his memory or that of his counsel in order to support his claim. But under Section 753(f) the defendant's memory need only provide him with some reason why a transcript would be helpful; he need not rely on his memory to establish the claim on its merits. And the very fact that a defendant has applied for collateral relief after he decided not to appeal suggests that the defendant *has* remembered something from the original trial. An applicant for collateral relief under these circumstances should have no difficulty articulating what he has remembered that now has convinced him that good grounds for relief exist.

Even if this line of argument is discounted, respondent was not treated unfairly by being required to articulate his reasons for believing that the transcript would reveal grounds to set aside his conviction. As *Ross* emphasized, the inquiry into whether an indigent has need of a particular legal service turns in large measure upon the nature of the proceeding in which he presents his claims. We explain in the following discussion that there are sound constitutional grounds for distinguishing between direct appeal and collateral attack, and that these differences justify the requirements of Section 753(f)—that an indigent demonstrate a colorable need for a transcript to support an arguably meritorious claim.

C. THE FUNDAMENTAL DIFFERENCES BETWEEN APPEAL AND COLLATERAL ATTACK SUPPORT THE REQUIREMENTS OF SECTION 753(f)

Prior to the instant case, the courts of appeals uniformly had held that furnishing a transcript to a prisoner "ought to be responsive to the appearance of need for it" (*United States* v. *Shoaf,* 341 F. 2d 832, 836 (C.A. 4)), and that a prisoner has no right to a transcript for "exploratory use" in a belated search for error. The underlying rationale of these cases, in six circuits, is that requiring an indigent prisoner to show a colorable need for a verbatim transcript is consistent with the fact that collateral attack is an extraordinary mode of relief. We believe that that reasoning is correct.

We begin with the observation that this Court never has required a State to provide indigents seeking collateral review with transcripts of their *trials.* In each of the three cases dealing with transcripts for use on collateral attack, the indigent sought a transcript of the hearing in the collateral attack proceeding itself, where such a transcript was necessary to preserve an effective right to further review within the state system. *Lane* v. *Brown, supra,* involved a transcript of a *coram nobis* hearing that had to be filed with an appellate court as a prerequisite to review; *Long* v. *District Court of Iowa,* 385 U.S. 192, involved a transcript of a *habeas corpus* hearing, as did *Gardner* v. *California, supra.* After discussing *Lane, Smith* v.

Bennett, 356 U.S. 708, and related cases, the Court observed in *Ross* v. *Moffitt, supra* (417 U.S. at 607; emphasis added): "The decisions discussed above stand for the proposition that a State cannot arbitrarily cut off *appeal* rights for indigents while leaving open avenues of appeal for more affluent persons." As we now show, there are fundamental reasons, rooted in the nature of collateral attack, that explain the courts' reluctance to hold that the Due Process Clause confers upon indigents an unqualified right to a free verbatim transcript of their trials in that context.

It is an established rule that the writ of *habeas corpus* and its federal counterpart, 28 U.S.C. 2255, "will not be allowed to do service for an appeal" (*Sunal* v. *Large,* 332 U.S. 174, 178). For this reason, nonconstitutional claims that could have been but were not raised on appeal may not be asserted in collateral proceedings (*id.,* at 178–179; *Davis* v. *United States,* 417 U.S. 333, 345–346).[15] Even claims that could not have been asserted on direct appeal can be raised collaterally only if the alleged error constituted "a fundamental defect which inherently results in a complete miscarriage of justice" and "present[s] exceptional circumstances where the need for the remedy afforded

[15] "Every error is potentially reversible error; and many rulings of the trial court spell the difference between conviction and acquittal. If defendants who accept the judgment of conviction and do not appeal can later renew their attack on the judgment by *habeas corpus,* litigation in these criminal cases will be interminable" (*Sunal* v. *Large, supra,* 332 U.S. at 182).

by the writ of *habeas corpus* is apparent" (*Davis, supra,* 417 U.S. at 346; *Hill* v. *United States,* 368 U.S. 424, 428). In short, collateral attack is designed to test only "the very gravest allegations" of error (*Townsend* v. *Sain,* 372 U.S. 293, 312; *Kaufman* v. *United States,* 394 U.S. 217, 223–224).

In light of the very limited role of collateral review in our system of criminal justice—and the fact that the prisoner bears the heavy burden of assailing a facially valid judgment—it was reasonable for Congress to require an indigent prisoner to demonstrate a need for the trial transcript he seeks. Indeed, logic and practical experience suggest that a prisoner ordinarily has no such need; he therefore should be required to demonstrate that his case falls within the exception rather than the rule.

Few of the grounds that might arguably support collateral relief are likely to be established by review of the transcript of the trial. A trial transcript is most useful to establish errors in trial procedure (such as decisions to admit or exclude particular evidence, erroneous jury instructions, or claims of evidentiary insufficiency) that ordinarily must be raised on direct appeal or not at all. See generally Wright, *Federal Practice and Procedure: Criminal* § 595 (1969). Even a collateral attack upon the effectiveness of assistance of counsel cannot be founded simply upon disagreement with counsel's trial tactics: for example, disagreements with counsel's failure to object to questions or his cross-examination of

witnesses, the matters on which a transcript could be expected to shed light, do not demonstrate ineffective assistance.[16] Nor will a claim of insufficiency of the evidence, such as respondent raised (see App. 12), support collateral relief; respondent would have to allege that there was *no* evidence to support his conviction (*Garner* v. *Louisiana,* 368 U.S. 157; *United*

[16] "Questions of trial technique and strategy, being peculiarly individual in nature, are subject to appellate court scrutiny only where the representation is shown to have been so inadequate as to have virtually deprived the defendant of a trial." *United States* v. *Radford,* 452 F.2d 332, 335 (C.A. 7); see also *United States* v. *Hammonds,* 425 F.2d 597, 601 (C.A.D.C.).

Some courts have replaced the traditional standard for evaluating the assistance of counsel with a more rigorous standard. See, *e.g., United States* v. *DeCoster,* 487 F.2d 1197 (C.A.D.C.); *Beasley* v. *United States,* 491 F.2d 687 (C.A. 6). These courts of appeals would hold that, under some circumstances, counsel's inadequate overall performance at trial can deny a defendant his Sixth Amendment right to counsel. However, these latter courts apply different standards on collateral attack. Tactical "[e]rrors, even egregious ones [that might call for reversal on appeal], do not provide a basis for postconviction relief" (*United States* v. *Rubin,* 433 F.2d 442, 445 (C.A. 5)). And *DeCoster* itself expressly acknowledged the continuing authority of *Bruce* v. *United States,* 379 F.2d 113, 117 (C.A.D.C.), which held that "a more powerful showing of inadequacy is necessary to sustain a collateral attack than to warrant an order for a new trial * * * on direct appeal." Cf. *DeCoster, supra,* 487 F.2d at 1202 (Bazelon, C. J.).

We do not imply by this that one in respondent's position is foreclosed from contending that he has received inadequate assistance of counsel. Collateral review of such claims is particularly appropriate where the grounds of the contention do not appear in the record on direct appeal. We do submit, however, that decisions of trial tactics—which would have appeared in the record on direct review—cannot appropriately be assailed collaterally in the absence of a demonstration that appellate counsel was inadequate.

States ex rel. Vajtauer v. *Commissioner of Immigration,* 273 U.S. 103).[17] At all events, claims of total lack of evidence could be refuted by a production of exhibits or portions of a trial transcript; a full transcript would be superfluous once *some* evidence of guilt was discovered.

By the same token, many of the grounds that might arguably support collateral relief either are evident from documents other than the trial transcript or are not reflected in the records at all.[18] Judge (now Chief Judge) Haynsworth of the Fourth Circuit spoke soundly and from experience in observing (*United States* v. *Shoaf,* 341 F. 2d 832, 835):

[17] Moreover, the failure to assert on direct appeal a claim of total absence of evidence to support a conviction almost certainly would constitute a "deliberate bypass" (*Kaufman* v. *United States*, *supra*, 394 U.S. at 227, n. 8). Respondent has not alleged either that there was no evidence to support his conviction or that his counsel's assistance was ineffective because counsel did not pursue an appeal.

[18] A form proposed by the Judicial Conference of the United States for use by prisoners in filing Section 2255 motions lists, as an aid to the prisoner, the following "most frequently raised grounds for [Section 2255] relief":

(a) Denial of effective assistance of counsel.

(b) Denial of right of appeal.

(c) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(d) Conviction obtained by use of coerced confession.

(e) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(f) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(g) Conviction obtained by a violation of the privilege against self-incrimination.

(h) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(i) Conviction obtained by a violation of the protection against double jeopardy.

(j) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.

See *Proposed Rules Governing § 2255 Proceedings for the United States District Courts*, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Preliminary Draft, 1973).

> The usual grounds for successful collateral attacks upon convictions arise out of occurrences outside of the courtroom or of events in the courtroom of which the defendant was aware and can recall without the need of having his memory refreshed by reading a transcript. * * * [R]arely, if ever, would the defendant, himself, need a transcript of the trial to become aware of the events or occurrences which constitute a ground for collateral attack.

Because a transcript of the trial is so rarely needed to support even a meritorious collateral attack, and because the prisoner must bear the initial burden of impeaching the validity of his conviction, it is not fundamentally unfair for Congress to provide free trial transcripts only to those prisoners who make a showing of colorable need for a transcript to support a nonfrivolous claim. We submit that the inquiry into possible need and conceivable merit is no more demanding an inquiry than a prisoner who could afford a transcript would address to himself and his counsel. With the exception of the exceedingly wealthy for

whom money is no object, an individual able to pay for a transcript, but aware of the limited scope of review on collateral attack, would ask himself whether a transcript was likely to be of use. He might remember incidents at trial that he thought unfair to him; if he did, he might order a transcript to refresh his memory and create documentation in anticipation of applying for collateral relief. He would not, however, expend his funds without some prospect of return.[19] Section 753(f) establishes the same sort of process: respondent need only state *why* he believes that he was denied the effective assistance of counsel. Once he has told the court the basis for his contention, the court could order a full transcript of the trial to be prepared, direct the preparation of the relevant part of the transcript, or rule that the allegations, even if true, would not create an entitlement to relief.

The rule that an indigent must show a need for a transcript to support a colorable claim does not leave respondent and others in his position without significant legal aid. Federal courts are not closed to those who cannot afford transcripts. On the contrary, a trial transcript is available if the prisoner can make

[19] Cf. Oaks and Lehman, *A Criminal Justice System and the Indigent* 150 (1968): "The more advantages society extends to the indigent, the more apparent is the comparative disadvantage of being of modest means. Indigents * * * are already receiving more than many 'non-indigents' can afford. * * * Even those with sufficient resources * * * will probably be unwilling to beggar themselves to enjoy the same opportunity as an indigent appellant, who is furnished with appellate counsel, a free transcript and an allowance for out-of-pocket expenses no matter how frivolous his appeal."

even a minimal showing—and counsel often is provided to help him make that showing. In *Coppedge* v. *United States, supra,* this Court established the procedure to be followed by the federal courts in passing upon applications to appeal *in forma pauperis* under 28 U.S.C. 1915(a). The district court here applied the *Coppedge* procedure to respondent's application for collateral relief. After receiving respondent's complaint, the court permitted him to proceed *in forma pauperis.* Because it was not possible to ascertain from the complaint whether, under the "objective" standard of *Coppedge,* a nonfrivolous issue was presented, the Court appointed counsel to aid in attempting to discover the nature of respondent's complaint and to present to the court any facts establishing that respondent was in need of a transcript to support a nonfrivolous claim for release. As counsel later represented to the court of appeals, however, his investigations did not yield any reason to believe that the transcript would support respondent's bare assertions, or that it would be needed for any reason other than to search it in the hope that it would yield support for an assertion whose nature could not yet be discovered (Pet. App. 2a). Only when the investigation with the aid of counsel was unsuccessful did the district court decline to require the government to prepare and provide respondent with a verbatim transcript.[20]

[20] The court of appeals apparently believed that, because the district court had permitted respondent to proceed *in forma pauperis* and had appointed counsel for him, it effectively had concluded that respondent had presented a nonfrivolous claim for collateral relief. See Pet. App. 10a, 19a. In the court of appeals'

Respondent has had a fair opportunity to receive a transcript, either by taking a direct appeal or by showing, as Section 753(f) requires, a particularized need for a transcript to support a colorable claim for collateral relief. The requirements of Section 753(f) are justified by the limited scope of review on collateral attack.[21] Section 753(f) acts as a reasonable check against attempts to make collateral attack do service for appeal; it reinforces the fact that collateral review "is a special proceeding to right wrongs, not a routine procedure to search for them * * *" (*Bernier* v. *Moore,* 441 F. 2d 395, 396 (C.A. 1)). As the same court has elsewhere put the matter, collateral attack is not "a general form of relief for those who seek to explore their case in search of its existence" (*Aubut* v. *Maine,* 431 F. 2d 688, 689).

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view, this meant that the only constitutional question remaining was whether a prisoner must demonstrate a particularized need for a transcript to support a claim for collateral relief that the court already had concluded was not frivolous.

We submit that this seriously misconceives the import of the district court's action. The court of appeals failed to distinguish a nonfrivolous *claim for a transcript* from a nonfrivolous *claim for collateral relief*. The district court concluded that respondent had demonstrated the former, and therefore appointed counsel to assist respondent and the court in ascertaining whether respondent should receive the transcript for which he had made a nonfrivolous claim. The district court had not then passed upon whether the requirements of Section 753(f) were met; indeed, the court appointed counsel for respondent so that such an inquiry could be undertaken. When the district court thereafter concluded that respondent was not entitled to a transcript, it implicitly resolved against respondent both the question of need and the question of nonfrivolous grounds for collateral relief.

[21] The court of appeals observed (Pet. App. 9a) that the "need" requirement of Section 753(f) does not extend in terms to transcripts ordered in connection with *habeas corpus* petitions by federal prisoners. That fact, the court apparently believed, contradicted the congressional design "to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by *habeas corpus* * * *" (*Hill* v. *United States,* 368 U.S. 424, 427). However, we do not believe there is any contradiction. While Section 753(f) does not expressly authorize a judge to condition the provision of a trial transcript in *habeas corpus* proceedings on a showing of colorable need, the section must be read in light of its legislative history. Prior to 1965, Section 753(f) contained no reference to Section 2255. A conflict therefore had developed in the courts of appeals whether the federal courts had power to order transcripts for use in Section 2255 proceedings. (See Pet. App. 9a; Sokol, *The Availability of Transcripts for Federal Prisoners,* 2 Am. Crim. L. Q. 63 (1964)). The amendment to Section 753(f) was intended to make it clear that indigents petitioning under Section 2255 had as great a right to a transcript as did those petitioning for *habeas corpus.* The inclusion of language requiring a showing of colorable need for a transcript merely reflected the judicial practice under Section 2255, as under *habeas corpus,* of providing transcripts only in response to a showing of a colorable need. See *Benthiem* v. *United States,* 403 F. 2d 1009, 1011 (C.A. 1); *Ketcherside* v. *United States,* 317 F. 2d 807, 808 (C.A. 6).

D. THE ROUTINE PROVISION OF TRIAL TRANSCRIPTS WITHOUT A SHOWING OF NEED WOULD SIGNIFICANTLY INCREASE THE WORKLOAD OF COURT REPORTERS AND CONTRIBUTE TO THE ALREADY SERIOUS PROBLEM OF DELAY IN THE FEDERAL APPELLATE COURTS

The limited scope of collateral review of convictions is attributable in major part to the need to accord finality to judgments entered after fair trials. Another practical consideration supports the limited scope of review under Section 2255—the burden imposed by such proceedings on the legal system, from judges to clerical personnel.

> Those resources are limited but demand on them constantly increases. There is an insistent call on federal courts both in civil actions, many novel and complex, which affect intimately the lives of great numbers of people and in original criminal trials and appeals which deserve our most careful attention. To the extent the federal courts are required to re-examine claims on collateral attack, they deprive primary litigants of their prompt availability and mature reflection. After all, the resources of our system are finite: their over-extension jeopardizes the care and quality essential to fair adjudication. [*Schneckloth* v. *Bustamonte*, 412 U.S. 218, 260–261 (Powell, J., concurring; footnotes omitted).]

The same considerations that call for limits upon the issues cognizable on collateral review also call for limitations upon the assistance courts will furnish to those who would seek collateral relief.[22] The indigent prisoner who has waived appeal but subsequently requests a verbatim trial transcript creates a drain on judicial resources perhaps even more severe than does the defendant with a transcript who frivolously seeks to relitigate ordinary trial errors. Section 753(f) creates a practical and fair limitation, allowing the district court to sift frivolous cases from those deserving of a greater call upon our limited resources.

[22] Mr. Justice Powell's concern with the burgeoning resort to relief in the federal courts by federal and state prisoners is supported by statistics indicating that between 1966 and 1975 petitions by federal prisoners rose from 2,292 to 5,047, an increase of 120.2%; and petitions by state prisoners rose from 6,248 to 14,260, an increase of 128.2%. *1975 Annual Report of the Director of the Administrative Office of the United States Courts*, p. XI–49.

Delays in transcription are a major contributor to the serious problem of delay in the federal appellate courts.[23] If prisoners can receive a transcript of their trial without any showing of need, it is not unreasonable to assume that a substantial number of those who did not appeal their convictions [24] will request a transcript to explore for error, thereby further increasing the workload of the limited pool of federal court reporters. And a constitutional requirement that verbatim transcripts must be furnished to prisoners on demand would apply equally to state prisoners who did not appeal but who request a transcript to

[23] "The problem goes beyond fairness and monetary considerations and seriously involves the efficient functioning of the courts. It has been noted time and again that the delay in deciding appeals is often attributable to delay in getting a transcript." *Jones* v. *Superintendent*, 460 F. 2d 150, 153, n. 4 (C.A. 4), certiorari denied, 410 U.S. 944. See also Ebersole, *improving Court Reporting Services*, Federal Judicial Center, pp. 3, 29–31 (February 1972). The Administrative Office of the United States Courts has informed us that it believes requests for transcripts to be used only for perusal in the hope of finding an error would require many hours of court reporters' time—time that is urgently needed for transcribing materials necessary for appeals and arguably meritorious collateral attacks.

[24] Approximately one of every three persons convicted after a trial in the federal courts currently does not appeal his conviction.

Year	Convictions after trial	Criminal appeals filed
1972	5,506	3,980
1973	5,974	4,453
1974	5,539	4,067
1975	5,617	4,187

Source: *Annual Report of the Director of the Administrative Office of the United States Courts (1972, 1973, 1974, and 1975), Tables B1 and D1.*

pursue state or federal post-conviction remedies. Such a rule, therefore, would both increase the burden upon state court reporters and create additional inducement to state prisoners to have recourse to federal collateral attack.

The court of appeals discounted these practical considerations by suggesting that "[i]f a free transcript were prepared on demand, the transcript may well reveal no colorable grounds for collateral attack, and the court will be spared the time consumed in a transcript hearing and a frivolous 2255 motion" (Pet. App. 18a). Experience indicates, however, that there is no reason to suppose that the availability of transcripts diminishes the incidence of "frivolous 2255 motion[s]." Nor are we aware of any significant problem of lengthy "transcript hearing[s]" that would justify the solution the court of appeals suggested; certainly the other courts of appeals have perceived none.[25]

We do not argue that the drain upon judicial and reportorial resources is a good reason for denying trial transcripts to all indigent prisoners. That would be too high a price to pay for administrative convenience. The practical considerations we have discussed are, however, strong support for Congress' judgment, expressed in Section 753(f), that a prisoner must demonstrate a need for the transcript he seeks. Congress has not attempted to block the poor from

[25] Moreover, such considerations, even if valid, are properly addressed to the legislative decision and afford no grounds for the judiciary to reject as unconstitutional the decision of Congress that a showing of need should be required.

vindicating just claims. Section 753(f) simply adopts a procedure this Court already has approved for use in determining whether an indigent is entitled to publicly appointed counsel on appeal. *Coppedge, supra,* instructed the lower federal courts to grant motions to appeal *in forma pauperis* whenever the movant is able to make "a rational argument on the law or facts" (*id.* at 448) or present "arguable claims" for relief on the merits (*id.* at 454). Section 753(f) creates an identical procedure for the indigent who has waived appeal and seeks a transcript to pursue collateral attack: he need show only a colorable claim for relief arguably necessitating the preparation of a full transcript. The requirements of Section 753(f), no less than this Court's decision in *Coppedge*, are sensible, practical, and equitable. They do not deny respondent due process of law.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

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OCTOBER TERM 1975

No. 74-1487

UNITED STATES OF AMERICA,

Petitioner,

v.

COLIN F. MacCOLLOM,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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IN THE

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UNITED STATES OF AMERICA,

Petitioner,

v.

COLIN F. MacCOLLOM,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

The opinions below and jurisdictional statement are set forth adequately in Petitioner's Brief at page (1).

QUESTIONS PRESENTED

The question presented on certiorari is somewhat narrower than as stated in Petitioner's Brief p. (2):

Whether an indigent federal prisoner who did not appeal his conviction, whose original trial counsel has

been replaced by new counsel, and who alleges general constitutional error of denial of effective assistance of counsel and lack of sufficient evidence to support his conviction is entitled to a free verbatim transcript of his trial in aid of a habeas corpus proceeding.

ADDITIONAL CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

First Amendment –

> "Congress shall make no law . . . abridging the right to the people . . . to petition the Government for a redress of grievance."

Article I, § 9 Cl. 2 –

> "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it."

28 U.S.C. § 753(b) –

> "One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of the court or by one of the judges, and shall record verbatim by shorthand or by machanical means . . . (1) all proceedings in criminal cases had in open court; . . . (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court or as may be requested by any party to the proceeding."

STATEMENT

After a two day jury trial in the United States District Court for the Western District of Washington,

respondent was convicted of uttering forged currency, in violation of 18 U.S.C. 472. On June 4, 1970 he was sentenced to a term of ten years imprisonment. His court-appointed attorney, Respondent being indigent then and at all times since, advised him not to appeal since "it would interfere with a motion to modify sentence." Subsequently on July 6, 1971, the district court denied respondent's motion for modification of his sentence.

Shortly after his original sentencing respondent was incarcerated at McNeil Island Federal Penitentiary in Washington and then transferred administratively to Leavenworth Penitentiary in Leavenworth, Kansas. (App. 9). Shortly after his arrival there, and prior to his being informed of the district court's denial of his motion to modify his sentence, respondent contacted a prison legal services project being run by the University of Kansas Law School and requested aid in preparing a habeas corpus petition for relief.

At this time, respondent was incarcerated in a maximum security, solitary confinement cell, where he remained during all the relevant proceedings in the district court. A second year law student, Laurence Yackle,[1] attempted to assist respondent in preparing a 28 U.S.C. 2255 petition. Because of the conditions under which respondent was incarcerated, the lack of availability of the original trial counsel, the lack of any trial notes or other memoranda from the trial, Mr. Yackle assisted respondent in requesting a transcript from the district court in order to frame his claims of constitutional error.

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[1] Presently assistant professor of Law at the University of Alabama; author of "Indigent's Right to a Transcript of Record" 20 Kan. L. Rev. 746 (1972).

After correspondence between respondent and the district court, (app. 6-7, 10-12) local counsel was appointed to assist in the claim for a transcript and for § 2255 relief. Local counsel was equally unable to contact the original trial counsel and the present proceeding for a transcript was continued in the absence of any other means of asserting respondent's claims of ineffective assistance of counsel and lack of sufficiency of the evidence.

Following counsel's appointment (App. 3-4) a hearing on the government's motion to dismiss was held on January 12, 1973 and the government's motion granted without hearing argument. Respondent timely appealed. At the oral argument before the Court of Appeals, counsel for respondent advised the Court that he could not, [in the absence of any other trial record], assert that sufficient grounds existed for a successful claim of either constitutional error raised by respondent until counsel has reviewed a transcript of the trial.

A Ninth Circuit panel, Judge Alfred Goodwin for the majority, reversed holding that an indigent federal prisoner who has not exercised his right of appeal is entitled to a transcript of his trial in order to assist him in the preparation of his post-conviction relief motion under 28 U.S.C. § 2255 (Pet. App. 19a). Subsequently a petition for rehearing *en banc* was denied with five dissenting votes. (Pet. App. 23a-24a).

At all times, the following facts as pled by Respondent at the district court were assumed to be true in order to rule upon the original government's motion to dismiss and for the issues to be reviewed by the Ninth Circuit and this Court.

(1) Appellant is indigent.

(2) Appellant's belief that the sought for transcript would assist him in preparation of his § 2255 proceeding by revealing lack of effective assistance of counsel at trial and insufficiency of the evidence to sustain appellant's conviction, was a good faith belief and not frivolous.

(3) Appellant had no effective alternative to the transcript since his memory, personal notes, etc., were inadequate to provide the requisite information.

(4) Appellant did not appeal his original conviction.

SUMMARY OF ARGUMENT

The Court of Appeals below held, and Respondent here asserts that a federal indigent prisoner, who alleges constitutional error of a general nature, who is represented by new counsel for his 28 U.S.C. § 2255 proceeding, and who has not appealed his original conviction is entitled to a verbatim transcript at public expense help him prepare his § 2255 or habeas corpus petition.

I. The policy considerations relied upon by the Ninth Circuit Opinion in reaching this conclusion did not depend upon a mandated equality of legal services to be provided to wealthy and indigent individuals, (Pet. Br. 7-8) but rather upon an adequate opportunity for access to habeas corpus relief for indigents as well as wealthy petitioners. (Pet. App. p. 16a).

28 U.S.C. § 2255 proceedings are the sole remedy for federal prisoners and § 753, construed as the Government asserts, requires a prior showing of specified need

and a certificate of non-frivolity before a transcript may be provided to a petitioner such as MacCollom. At the same time, a showing of non-frivolity under § 2255 requires citation of error to the record in the petition or else it will be dismissed as frivolous, a "Hobson's choice" has been created. MacCollom cannot cite to specific error occurring at a particular place in the trial without a transcript since his good faith allegations are of ineffective assistance of counsel and lack of sufficiency of the evidence to convict. But if he files his petition without such citation, he will be dismissed as frivolous.

II. Accordingly the Ninth Circuit analyzed the history of § 2255 and § 753(f) and concluded that the addition of the certificate requirement and specifications of need language of 753(f) did not apply to the narrow class of petitioners represented by MacCollom. The history of the inclusion of this section and its apparent internal inconsistencies warrant the construction of the statute adopted by the Ninth Circuit allowing a prior application for a transcript by a potential § 2255 petitioner where the alleged error can only be shown by a full transcript. To do otherwise results in a suspension of the Writ of Habeas Corpus.

III. Assuming that the Government's construction of 753(f) is adopted to bar such prior access to a transcript, the application of 753(f) denies petitioner due process of law by unduly encumbering his original habeas corpus proceeding. Cases of this Court, *Ross v. Moffitt*, 417 U.S. 600, *Britt v. North Carolina*, 404 U.S. 226, and *Griffin v. Illinois*, 351 U.S. 277, require a balancing of the nature of the indigent litigant's rights against the governmental interests of conserving costs and screening frivolous appeals. These cases lead to the

conclusion that an indigent federal prisoner who alleges constitutional error in the only constitutionally guaranteed review available to him is entitled to a verbatim transcript to aid his new counsel or himself to prepare his application for relief pursuant to Art. I, Sec. 9, cl. 2 or 28 U.S.C. 2255 where no other adequate alternative exists.

IV. The Government's construction of 753(f) also denies Respondent his due process rights to equal protection of the laws. *Griffin, supra; Ross, supra.* These cases indicate that where there is a constitutionally guaranteed review procedure, Art. I. Sec. 9, cl. 2, and no adequate alternative to a transcript, such must be provided. Accordingly, the decision below should be affirmed.

ARGUMENT

An Indigent Federal Prisoner Who Has Not Appealed His Original Conviction, Who Alleges Constitutional Error for His Trial, And Who Has New Counsel For His Post-Conviction Relief Proceeding, Is Entitled To A Verbatim Transcript to Prepare His Petition.

This case presents one facet of the question reserved by this Court in *Wade v. Wilson*, 396 U.S. 282; and *Britt v. North Carolina*, 404 U.S. 226: to what degree and under what circumstances must the federal government afford a verbatim trial transcript to a federal prisoner pursuing post-conviction relief?

At the outset, Petitioner has asserted that the decision of the Ninth Circuit below is in clear conflict with the decisions of other courts of Appeal, (Pet. Br.

12-13). Respondent respectfully disagrees and submits that each of the cases relied upon by Petitioner is distinguishable.[2] However, it is clear that a substantial

[2]Petitioner has cited six Courts of Appeals with allegedly conflicting decisions:

> Six other courts of appeals have addressed the issue in federal cases. *See Benthiem v. United States,* 403 F.2d 1009 (C.A. 1), certiorari denied, 396 U.S. 945; *United States v. Shoaf,* 341 F.2d 832 (C.A. 4); *Cowan v. United States,* 445 F.2d 855 (C.A. 5); *Bentley v. United States,* 431 F.2d 250 (C.A. 6), certiorari denied, 401 U.S. 920; *Culbert v. United States,* 325 F.2d 920 (C.A. 8); *Martinez v. United States,* 344 F.2d 325 (C.A. 10). (Pet. Br. 12-13).

Without exception, all of the cases cited are pre-*Britt v. North Carolina,* 404 U.S. 226 (1971), the most recent decision of this Court which specifically reserved the broader question asserted by Petitioner. Petitioner has cited no post-*Britt* case which is in conflict with the opinion of the Ninth Circuit.

In the First Circuit Case cited by Petitioner, *Benthiem, supra,* the petitioner therein filed a § 2255 motion prior to the application for a transcript. A full hearing on said motion was had and the application for a transcript was made after the hearing on the merits had been concluded. At the hearing, where the only asserted error was the lack of assistance of counsel at trial, the reviewing court had before it an affidavit of the original trial counsel setting forth his efforts on Petitioner's behalf, a government memo attesting to the competence of the trial attorney, and a concurrence by the appointed counsel for the petitioner that the original trial lawyer had not been incompetent.

Respondent herein, did not have such a hearing, no record of the frivolity of his assignments of error existed and the opposite was taken as true by the court in order for the motion to dismiss to be ruled upon. In other words, there was no record before the Court herein for dismissal of the underlying § 2255 proceeding as there was in *Benthiem* which justified the conclusion that a transcript would not be of assistance to the petitioner therein.

In the Second Circuit case cited by Petitioner, *U.S. v. Carella, supra,* the facts are radically different from the Respondent

(continued)

difference of approach to the policy and function of post-conviction relief is reflected between the Ninth Circuit and other courts of appeals. Accordingly,

(footnote continued from proceeding page)

herein. In *Carella,* the issue was not availability of a transcript of a trial to aid in post-conviction relief proceedings, but rather a complete transcript of a prior mistrial to aid in preparation for a second trial. *Carella* asserted that he needed the transcript to aid him in cross-examination of government witnesses. In lieu of this complete transcript, Carella had been given a partial transcript including all of the prosecution's direct witnesses testimony and had available trial counsel's notes of all testimony, grand jury testimony and § 3500 statements of witnesses. No allegation of need for the complete transcript was presented. Respondent herein, however, had none of these alternatives available and was seeking the transcript not for some hypothetical purpose but specifically for the preparation of his § 2255 proceeding.

The Fourth Circuit case of *U.S. v. Glass, supra* is not in conflict since Glass had plead guilty to the original charges and the basis of his § 2255 proceeding was not trial error but promises made to induce the guilty plea. No allegation of the necessity of the transcript to aid in presentation of this issue was made. Further, the district court in *Glass* did not rule upon the *in forma pauperis* application of *Glass.* The Fourth Circuit simply noted this apparent lack of necessity and remanded the case for a determination of the merits of the § 2255 claim. Respondent herein, however, has alleged his good faith belief that his transcript is necessary for the preparation of his non-frivolous claims of error and no alternative source is available to him.

Similarly, in *United States v. Schoaf, supra,* no allegation of error at trial was contained in the petitioner's request for transcript. The Fourth Circuit remanded for a determination of the necessity of a transcript since the lack of error alleged by *Schoaf* did not make it clear whether a transcript was appropriate. Respondent herein has alleged that this error which is in good faith asserts, can only be determined with the aid of a transcript. *Schoaf* is not only pre-*Britt* but precedes most of the case law development on right to transcript. *See* opinion below. p. 3-10.

The Fifth Circuit case cited by Petitioner, *Cowan v. United States, supra,* is per curiam opinion without discussion of the

(continued)

Respondent demonstrates that the opinion below properly reflects the balance of rights of indigents and the constitutional demands of due process of law, equal

(footnote continued from proceeding page)

facts or law applied other than to string cite earlier authority which, as does *Cowan* predates *Britt* and apparently is no different than those cases discussed, *supra*, in other circuits. (*See Skinner v. United States*, 434 F.2d 1036 a blanket assertion by the Petitioner of an absolute right to a transcript without any alleged error noted.) Respondent herein has alleged error and the necessity of the transcript for such error.

In *Bentley v. United States, supra*, the Sixth Circuit denied a request for transcript in a post-conviction relief motion where there had been an appeal taken from the original trial and stipulated facts and issues in lieu of a transcript had been agreed upon. In the subsequent post-conviction relief request for transcript by *Bentley*, no allegation of error was contained which indicated a need for a transcript rather than the original stipulation. Again, Respondent's factual setting and allegations are not on point.

Similarly, in the Eight Circuit case cited by Petitioner, *Culbert v. United States, supra*, the alleged error was limited solely to the asserted incompetency of counsel at trial and the request for a transcript occurred *after* the denial of the § 2255 application on the merits. In other words, unlike Respondent herein, a litigation of the frivolity of the alleged error occurred prior to the request for transcript. The Eighth Circuit opinion relied heavily on *United States v. Glass, supra*, discussed *supra*.

Lastly, the Tenth Circuit case cited by Petitioner, *Martinez v. United States, supra*, recites that the alleged errors asserted by the Martinez "defy intelligent analysis." No further discussion of allegations or relevancy of a transcript is made. Apparently this request for a transcript in the collateral proceeding was made only on appeal from the denial of the § 2255 motion and was asserted as a general right. Respondent, herein asserted both specific error for which the transcript was required and requested the transcript prior to the district court ruling on the § 2255 application.

(continued)

protection of the law, and access to Art. I, § 9, cl. 2 post-conviction relief.

I.

THE POLICY OF THE NINTH CIRCUIT OPINION, WHEN CONFINED TO RESPONDENT'S CLASS OF INDIGENT PRISONERS, PROPERLY BALANCES THE SCREENING OF FRIVOLOUS CASES AND ADEQUACY OF POST-CONVICTION RELIEF.

The underlying policy of the Ninth Circuit and that urged by Respondent to this Court is to provide an effective means to exercise the right to collateral review (Pet. App. 13a-19a).

For federal prisoners such as MacCollom, the only means of review available is collateral review by habeas corpus guaranteed by Article I, Sec. 9, cl. 2 through 28 U.S.C. § 2255, where no original appeal was taken from their convictions. Since such review is subject to general

(footnote continued from proceeding page)

The actual and narrow holding of the Ninth Circuit is not in conflict with the specific holdings of the other circuits cited by Petitioner. Rather, the only conflict is in the degree of showing of necessity required for production of a transcript. The opinion below simply asserts that an adequate showing under *Wade v. Wilson*, 396 U.S. 282 (1970) and *Britt v. North Carolina, supra*, is accomplished where a good faith assertion of trial error is made, the District Court makes the § 1915 certification of non-frivolity, and the petitioner is indigent. Petitioner submits that such a holding is consistent with the *Wade* and *Britt* decisions which are the latest statements by the Court and which post-date the case law relied upon by Petitioner.

in forma pauperis provisions including 28 U.S.C. § 753(f) as amended in 1965, which states in pertinent part:

> "... Fees for transcripts furnished in proceedings brought under section 2255 of this title to persons permitted to sue or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal."

Respondent's case presents this Court with a two fold problem of statutory analysis: (1) What is the meaning of the language of 753(f) apparently requiring certification and specification of need to be shown by a petitioner pursuant to 28 U.S.C. 2255 prior to a transcript being made available, and (2) if such language is construed (as the Government asserts) to require both a showing of non-frivolity and particularized need before a transcript will be provided, is 753(f) constitutional? The statutory interpretation is treated in depth at § II, *infra* and the major constitutional arguments at § III and IV *infra* and will not be repeated here. The Ninth Circuit, in attempting to resolve both questions relied heavily on the following policy considerations which Respondent submits should be controlling to this Court: (Pet. App. 13a-19a):

(1) Federal Habeas Corpus and its statutory equivalent for federal prisoners are a primary right guaranteed by Art. I § 9, cl. 2 of the Constitution. Section 2255 proceedings are the exclusive remedy provided by Congress for federal prisoners to exercise their Article I, § 9, cl. 2 rights. A federal prisoner exercising his § 2255 review must cite specific error in the record or his

application will be dismissed as frivolous without hearing. Such dismissal is a bar to further applications.[3]

(2) Federal Prisoners such as MacCollom who have not appealed their original trials and who are now barred from appeal have no other remedy than § 2255 for relief.

(3) The availability of a transcript to an indigent federal prisoner is of even greater importance for § 2255 proceedings because of this bar to subsequent applications for relief and because the prisoner is remote in time and often in place from the trial, original trial counsel, and access to records of the trial.

(4) There can be no adequate substitute for a transcript under the circumstances of MacCollom's petition where the allegations are of inadequacy of counsel and insufficiency of the evidence which require the entire record to be produced for review, otherwise such constitutional claims can never be raised by MacCollom under the statutory schemes.

(5) A contrary result will bar the small class of litigants such as MacCollom from any review of their trial.

Additional policy factors to be considered include the ability of the federal courts to adequately screen federal § 2255 proceedings where no transcript references can be reviewed to see if allegations are supported and the relative costs of litigation of transcript questions. (Pet. App. p. 9a-10a).

In opposition, the Government argues that 753(f) requirements must apply across the board to habeas corpus and § 2255 proceedings alike and do not unduly bar access to indigent prisoners. Central to the

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[3] See generally Note, "The Indigent's Right to a Transcript of Record," 20 Kan. L. Rev. 746 (1972).

Government's position is the assertion that post-conviction relief is secondary, both constitutionally and in importance to the opportunity for direct appeal. The Government argues that only a single "... fair opportunity for review" need be provided and the "Respondent has been afforded such an opportunity" since he "could have appealed." (Pet. Br. p. 7-8, 9, 10). Even further the Government argues that collateral attack is available for only "a very limited role ... in our system of justice," (Pet. Br. p. 26).[4]

The Government then argues that regardless of the inadequacy of Article I, Sec. 9, cl. 2 relief when modified by § 753(f) requirements, intentional bypass doctrine cures any denial of access since appeal was not exercised. (Pet. Br. 9).

Lastly, the Government argues that screening frivolous cases and costs to the system of justice justify such restrictions regardless of impact upon the individual petitioner or the class individuals including MacCollom. (Pet. Br. p. 33-35).

The Government's analysis of the relationship between post-conviction relief and appeal from conviction stands their constitutional relationship on its head. Nowhere in the constitution or in case law is appeal guaranteed, *Ross v. Moffitt*, 417 U.S. 600, *McKane v. Durston*, 153 U.S. 684. On the contrary, habeas corpus is the only guaranteed means of review in the constitution, Art. I § 9 cl. 2. Additionally, the function of habeas corpus was to go beyond appeal

[4] Apparently the quoted language at p. 26 of Pet. Br. is out of context in *Kaufman v. United States*, 394 U.S. 217, 223-224 since the text of 223-224 goes on to note that such review is for all constitutional errors.

remedies because of the availability of evidentiary hearings, *Townsend v. Sain*, 372 U.S. 293; and *Kaufman v. United States*, 394 U.S. 217. To argue, as the Government must to avoid constitutional challenge to § 753(f), that habeas corpus is an afterthought, an easily dismissed remedy, is to deny both the relative constitutional status and historical purpose of the Writ. *Smith v. Bennett*, 365 U.S. 708.

This argument is further extended (Pet. Br. 10-25) to a "bypass" argument relying heavily on the so-called rule that the writ of habeas corpus and § 2255 "will not be allowed to do service for an appeal." *Sunal v. Large*, 332 U.S. 174, 178 (1947). But the rule of *Sunal* and *Davis v. United States*, 417 U.S. 333 is limited to nonconstitutional claims. As the government concedes (Government's Brief at 26) collateral attack is designed to test only "the very gravest allegations" of error, i.e. constitutional error. *Townsend v. Sain*, 372 U.S. 293, 312; *Kaufman v. United States*, 394 U.S. 217, 223-24. The MacCollom motion has alleged inadequate representation of counsel and insufficiency of the evidence, both of which rise to the level of constitutional error. Although the requisite standard of proof may be rigorous [usually, the standard is whether counsel's incompetence rendered the trial a "farce and a mockery." See, e.g. *Jones v. Huff*, 80 U.S. App. D.C. 254, 152 F.2d 14 (1945)],[5] if that standard is met, foreclosing the prisoner from asserting his Sixth Amendment right to counsel by finding a "deliberate bypass" would be an egregious constitutional deprivation.

[5] The standard expressed in *United States v. DeCoster*, 487 F.2d 1197 (C.A.D.C.) and *Beasley v. United States*, 491 F.2d 687 (C.A. 6) is still the minority view.

All the cases cited by the government in its "deliberate bypass" argument are inapposite. The error alleged in *Sunal*, pertained only to an unfavorable evidentiary ruling on certain proffered evidence, and was unquestionably nonconstitutional error. 332 U.S. at 182. Similarly, in *Hill v. United States*, 368 U.S. 424, 426, the defendant alleged only that he had been denied the right to make a statement at his sentencing hearing. The Court concluded:

> "The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the character or magnitude cognizant under a writ of habeas corpus." at 428.

The Court in *Townsend v. Sain*, 372 U.S. 293, when faced with the question of whether federal courts hearing state prisoners' habeas petition could take evidence relevant to unconstitutional detention, refuted the notion that the role of habeas can be subsumed into appellate review.

> "The whole history of the writ - its unique development refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review. The function on habeas is different. It is to test by way of an original civil proceeding, independent of the normal channels of review of criminal judgments, the very gravest allegation . . . The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary."

As the Court pointed out in *Kaufman v. United States*, 394 U.S. 217 at 223, when habeas relief is sought based on a constitutional claim, the rule of

Sunal is inapplicable. That district was recognized in the *Sunal* opinion itself. 332 U.S. at 182. For all of the above reasons, the Court should reject the "deliberate bypass" argument.

Even if the "deliberate bypass" rule is applied to these facts, the Court should be reluctant to find that an indigent prisoner knowingly and intelligently waived his right to an appeal. One survey of § 2255 motions in the D.C. Circuit showed only nine of thirty-five § 2255 movants had had prior recourse to the appellate courts. G. Velman, 69 W. Va. L. Rev. 277, 283, n.45 (1967). That commentator suggested that the reason errors were "not raised on appeal lies in defects in availability of appeals to indigents." Id. at 283. See also Comment, Right to Counsel in Criminal Post Conviction Review Procedure, 51 Calif. L. Rev. 970, 974-76 (1963). Although counsel appointed for the first time on appeal can obtain a transcript under *Hardy*, the fact remains that an indigent prisoner does not have the assistance of counsel in preparing a motion for leave to appeal *in forma pauperis*. Thus, if a § 2255 petitioner fails to appeal, that should not bar him from seeking collateral relief when his claims are of constitutional stature. Cf. *Coppedge v. United States*, 369 U.S. 441.

Other arguments raised by the Government are focused on the costs to the criminal justice system of providing transcript and were adequately addressed by the opinion below. (Pet. App. 16a-19a); Note, "Rights to a Trial Transcript" 7 Conn. L. Rev. 479 (1975).

The Respondent submits that these policy considerations militate in favor of providing MacCollom and other similarly situated federal prisoners with transcripts to guarantee adequate post conviction relief and to allow adequate screening of frivolous and time

consuming prisoner applications by requiring a complete record before consideration of their petitions is made.

II.

THE NINTH CIRCUIT'S CONSTRUCTION OF 28 U.S.C. § 753(f) IS A REASONABLE ATTEMPT TO AVOID THE CONSTITUTIONAL IMPLICATIONS OF THE GOVERNMENT'S POSITION.

Although the history and purpose of § 753(f) are not a model of clarity and the Ninth Circuit's interpretation may be criticized,[6] it is a reasonable attempt to avoid constitutional attacks on the statute by resolving the ambiguity of the legislative history.

A. Legislative History of 28 U.S.C. § 753(f)

28 U.S.C. § 753(f) was first enacted in 1948, but was largely the product of the Judicial Conference of the United States study of the Court Reporter System in the early 1940s. The conference appointed a subcommittee, consisting of Circuit Judges Parker, Hicks, and Phillips to study the problem of compensation of court reporters. This committee reported to the conference in 1941, and bills were introduced in the House and Senate in 1943. The provision providing transcripts to

[6]See "The Scope of the Indigent Prisoner's Right to a Trial Transcript" 7 Conn. L.Rev. 495-499 (1975) and Meyer and Yackle "Collateral Challenges to Criminal Convictions" 21 Kan. L.Rev. 259-264, (1973).

indigents, later to become § 753(f), received a good deal of attention during the congressional hearings on H.R. 3142 and S. 620. Mr. Hobbs of Alabama, Chairman of Subcommittee No. 4 of the House Committee on the Judiciary questioned Mr. Henry P. Chandler, director of the Administrative Office of the United States Courts:

> Mr. Hobbs: . . . What do you think of the fees that would be permitted under this bill?
> Mr. Chandler: [After first misunderstanding Mr. Hobbs' question] Mr. Chairman, if a party is really a poor litigant, he can obtain transcript without charge. I think that the courts are pretty liberal in allowing a petitioner to sue as a poor person. If that leave is given and if also in a civil case the judge certifies that the appeal is not frivolous, that would carry his right to transcript without charge.

Thus, it was undisputed that there was no certification requirement in criminal or habeas cases, but only in other civil cases, as § 753(f) was originally drafted. To the same effect, see the letter from Judge Parker to Mr. Chandler at page 11 of hearings report S. 620. Since 753)f) was enacted prior to § 2255 the draftsmen of the former statute did not contemplate any certification requirement. Prior to § 2255, then, an indigent prisoner seeking habeas relief was entitled to a free transcript, apparently without the certificate needed by the civil indigent. As Professor Sokol has written:

> "It would seem strange to attribute to Congress in its enactment of section 2255 an intent to deprive an indigent prisoner of a right he would clearly have under section 753(f) in the absence of section 2255.[7]

[7]Sokol, The Availability of Transcripts for Federal Prisoners, 2 Am. Crim. L.Q. 63, 66, (1964).

After § 2255 was enacted it was unclear whether § 753(f) provided free transcripts for only those indigents who were preparing appeals. In *United States v. Stevens*, 224 F.2d 866 (1955), the Third Circuit Court of Appeals held that the free transcript clause of § 753(f) was so limited. But the Fourth Circuit Court of Appeals, subsequent to and under the influence of the landmark decision of this Court in *Griffin v. Illinois*, 351 U.S. 12 (1956), held that the district courts did possess power to furnish free transcripts to indigent federal prisoners making a motion to vacate sentence under § 2255, *United States v. Glass*, 317 F.2d 200 (1963). Although *Glass* seemed to rest solely on constitutional grounds, Professor Sokol contended that the court could have rested its decision on statutory construction. 2 Am. Crim. L.Q. at 72. To construe § 2255 proceedings as within the words "criminal or habeas corpus proceedings" in § 753(f) would hardly have been shocking, pointed out Sokol. In any case, the *Glass* decision created a conflict between the circuits. Congress apparently set out to resolve that conflict by amending § 753(f) to include an explicit reference to § 2255 movants, thus making it clear that they too could receive free transcripts.

The stated purpose of this 1965 Amendment to section 753(f) was to authorize furnishing of transcripts at public expense to persons convicted in the United States district court for use by them in § 2255 motions. However, the language adopted created an anomaly:

> "Fees for transcripts furnished in proceedings brought under section 2255 of this title to persons permitted to sue or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal." 28 U.S.C. § 753(f).

The conditions of non-frivolity and need are not present for habeas petitioners. The reasons for these legislatively created distinctions are less than clear:

> "Why do we have these distinctions in the statute? Are they merely careless draftsmanship or the product, so often confusing, of an amendment or compromise during the legislative process, or are the differences intentional and of significance?
>
> "The Committee apparently did not give much consideration to the distinction."

Blackmun, H. A., *Allowance of In Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases*, 43 F.R.D. 343 (1967) 356-357. Probably the addition of these two conditions for § 2255 movants was somewhat inadvertent, because of the apparent conflict with habeas corpus procedures. In a letter of May 27, 1965 from Ramsey Clark, then Attorney General, to Senator Eastland, Chairman of the Senate Committee on the Judiciary, Clark expressed his concern about the added conditions, stating:

> "The reason for this distinction is not apparent if the motion remedy under § 2255 is to be a remedy commensurate with the writ of habeas corpus."

2. U.S.C. Congressional and Administrative News, 89th Congress, 2916 at 2920-21 (1915). Obviously, the Attorney General feared that the section as amended was vulnerable to attack under the suspension of habeas corpus clause of the U.S. Constitution, Art. I, Sec. 9, cl.2.

There is no additional legislative history as to the intent of Congress in amending § 753(f) and the ambiguity is unresolved.

B. Relationship of § 2255 As Amended in 1965 to Habeas Corpus.

The legislative history of 28 U.S.C. § 2255, as outlined in *United States v. Hayman*, 342 U.S. 205, 210-219 (1952), demonstrates that Congress, aided by the Judicial Conference of the United States, adopted this statute to meet practical administrative problems in habeas corpus cases. District Courts in whose jurisdiction major federal prisons were located were inundated by habeas actions and often geographical removal from the homes of witnesses and lack of access to records of the sentencing court hindered meaningful judicial review. In its "Statement" to the House and Senate Judiciary Committee, the Conference described the § 2255 motion, in pertinent part, as follows:

> This section applies only to Federal sentences. It creates a statutory remedy consisting of a motion before the court where the movant had been convicted. The remedy is in the nature of, but much broader than, *coram nobis*. The motion remedy broadly covers all situations where the sentence is 'open to collateral attack.' *As a remedy, it is intended to be as broad as habeas corpus.* (emphasis added) 342 U.S. at 216-217.

This Court itself summed up the legislative history thus: "Nowhere in the history of § 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their conviction." 342 U.S. at 219. Hence, it is clear that Congress and the Court believe § 2255 exists to provide federal prisoners an avenue of collateral attack commensurate with habeas corpus.

In *Hayman*, this Court did not reach the constitutional question of suspension of habeas corpus, because of the preservation, in the last paragraph of § 2255 procedure is shown to be "inadequate or ineffective to test the legality of his [the movant's] detention." Since the motion remedy has very rarely been held inadequate or ineffective, in effect § 2255 replaces habeas corpus for federal prisoners seeking post-conviction relief. [citing cases] Professor Ronald P. Sokol has concluded: "As a practical matter, section 2255 *is* habeas corpus for federal prisoners" (emphasis added) 2 Am. Crim. L.Q. 63. Therefore the Supreme Court's reliance on the "inadequate or ineffective" savings clause to rebut the suspension argument seems misplaced. Apparently it is still possible for a § 2255 movant to prove the motion inadequate or ineffective, but several Supreme Court cases state that theoretical or abstract constitutionality is insufficient. Perhaps the courts simply believe the motion remedy is adequate in every case to fulfill the purposes of habeas corpus.[8]

As case law and commentators have shown, several significant procedural differences exist between § 2255 and habeas corpus. First, habeas may be sought in the

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[8] C. Wright, Federal Practice and Procedure § 591 "The statutory remedy is adequate and effective."

jurisdiction of confinement, while § 2255 motions must be brought in sentencing court. Second, in a habeas proceeding the prisoner must be present, while under § 2255 the judge has discretion to hold the hearing without the prisoner. As a result, the § 2255 movant must now frequently support his plea *in absentia* by affidavit; the government meanwhile counters the motion orally. See 59 Yale L.J. 1183, 1188 (1950). Although one might expect the judge to mitigate the *ex parte* nature of the proceeding in some way, apparently most federal judges are not disposed to do so. The jurisdictional change to the sentencing court was enacted largely to facilitate refutation of spurious claims by reference to more readily available trial records, according to Circuit Judge Parker, one of the primary draftsmen of § 2255. Parker, *Limiting the Abuses of Habeas Corpus*, 8 F.R.D. 171, 175 (1949). The third procedural difference between the two remedies is that a definite time limit is imposed on Courts and wardens in habeas proceedings; not so in § 2255 motions, which only require "promptness."

C. Effect of Reading the §753(f) as the Government Construes it Would Be To Suspend the Writ of Habeas Corpus in Violation of Art. I, §9, cl.2.

If the 1965 amendments are read to require a judicial certification of non-frivolity and need before a free transcript will be provided a § 2255 movant permitted to sue or appeal *in forma pauperis*, while habeas petitioners are subject to no such certification requirement under the statute, the remedy cannot be considered commensurate at all. When added to all of

the other procedural inroads made into the right of habeas corpus by enactment of § 2255, this interpretation of § 753(f) as amended in 1965 will have created insurmountable suspension problems under the present scheme by which federal prisoners seek collateral relief. Section 2255 can no longer truly be considered the substantial equivalent of the Great Writ. This Court should be solicitous of the views expressed in *Hayman* and in *Sanders v. United States*, 373 U.S. 1 (1963) to the effect that collateral remedies such as those under § 2255 must be broadly construed, because:

> "... if he were subject to any substantial procedural hurdles which made his remedy under § 2255 less swift and imperative than Federal habeas corpus, the gravest constitutional doubts would be engendered..." 373 U.S. at 14.

No purpose would be served by construing § 2255 proceedings to be subject to greater restraints than habeas corpus since MacCollom and others situated as he is would merely utilize the writ. Accordingly, the Government's position must be that habeas corpus and § 2255 proceedings are both subject to the 1965 amendment requirements. Such a result means that all litigants who assert post-conviction relief under Art. I, § 9, cl.2 are barred if their alleged error is of a general nature such as ineffective assistance of counsel or constitutional lack of sufficiency of the evidence. Such a bar clearly breaches the *Hayman* standards.

The attempt of the Ninth Circuit to avoid such a result (Petitioner's App. p. 8a-11a) is a reasonable one and should be left undisturbed. If the Government's construction is adopted, then 28 U.S.C. 753(f) must be stricken.

III.

THE CONSTRUCTION OF §753(f) URGED BY THE GOVERNMENT VIOLATES THE FIFTH AMENDMENT DUE PROCESS CLAUSE BY DENYING FEDERAL PRISONERS ACCESS TO THE CONSTITUTIONALLY GUARANTEED RIGHT TO COLLATERAL REVIEW: Art. I, Sec. 9, Cl. 2.

A. Effect of §753(f) on MacCollom

An indigent federal prisoner who wants a free verbatim transcript of his criminal trial must satisfy 28 U.S.C. § 753(f) (1970), which provides:

> "Fees for transcripts furnished in proceedings brought under section 2255 of this title to persons permitted to sue or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose if the trial judge certifies that the suit or appeal is *not frivolous* and that the transcript is *needed* to decide the issue presented by the suit or appeal." [Emphasis added].

Under the interpretation urged by the Government, § 753(f) contemplates that a federal prisoner must demonstrate both the non-frivolous nature of his claim for relief and his particularized need for a transcript to "decide the issue."[9] "[H]e must show merit, not just personal opinion." Such a showing of merit must appear, of course, in the form of specific allegations of fact constituting error.[10] General allegations are insuf-

[9] *Ellis v. State of Maine*, 448 F.2d 1325, 1327 (1st Cir. 1971).

[10] 7 Conn. L.Rev. 479, 490 n. 74 and cases cited therein.

ficient. Moreover, the inability to make specific factual allegations has effects far beyond the denial of a transcript under the Government's interpretation of § 753(f), because a federal prisoner seeking post-conviction review under § 2255 will surely be denied relief if he cannot substantiate his claimed deprivation of constitutional rights.

This Court has held that a federal court has power to deny a motion to correct or vacate sentence pursuant to 28 U.S.C. § 2255, on the ground that the motion states only bald legal conclusions with *no supporting factual allegations*, even though a better course may be to direct the movant to amend his motion. *Sanders v. United States*, 373 U.S.1, 18 (1963). Moreover, this Court has stated that "where an applicant for a writ of habeas corpus alleges *facts* which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew." *Kaufman v. United States*, 394 U.S. 217, 224 (1969) (emphasis added). The clear import of *Sanders* and *Kaufman* is that without supporting factual allegations, a § 2255 petitioner will not have his motion to vacate sentence granted, because the motion will be denied without a hearing or; if a hearing is granted; the petitioner will be unable to substantiate his claim. Although 28 U.S.C. § 2255 provides that [(u)nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto . . . ,"] the motion, files and records of a case do not necessarily contain supporting factual material is

to to be found in the verbatim transcript of the challenged proceeding. The petitioner's inability to obtain such a transcript would preclude his obtaining relief.[11] Despite the Government's contention that "many of the grounds that might arguably support collateral relief either are evident from documents other than the trial transcript or are not reflected in the records at all," cases will surely arise where grounds for collateral relief are evident only from the trial transcript.[12]

[11] The Ninth Circuit Court of Appeals recognized that without a transcript a petitioner would be incapable of discovering error. *MacCollom v. United States*, 511 F.2d 1116, 1117-(9th Cir. 1974). Since a petitioner's inability to obtain a transcript would be due, of course, solely to his indigent status, the indigent federal prisoner is placed in a "paradoxical situation; he must assert non-frivolous grounds to receive a transcript; yet, without the aid of a transcript to which he can refer, his chances of asserting non-frivolous grounds are minimal." 7 Conn. L.Rev. 479, 498 (1975).

[12] For example, in both *Kaufman v. United States*, 394 U.S. 217, 226 (1969) and *Townsend v. Sain*, 372 U.S. 293, 313 (1963) this Court has held that a federal court *must* review constitutional claims presented by federal prisoners if (1) the merits of the factual dispute were not resolved in the federal hearing; (2) the federal factual determination is not supported by the record as a whole; (3) there is a substantial allegation of newly discovered evidence; (4) the material facts were not adequately developed at the federal hearing; or (5) for any reason it appears that the state trier of fact did not afford the applicant a full and fair fact hearing. A transcript would probably be of little aid to a federal prisoner asserting his right to collateral review under ground (3), but a transcript would be helpful to a claim for review under grounds (1) and (5), and essential to a claim for review under grounds (2) and (4). MacCollom, of course, asserts a claim under ground (2).

Most typical of such cases are those in which the alleged constitutional deprivation results from either the ineffective assistance of counsel or a conviction unsupported by the record. These allegations can only be established by a review of the entire record, including a verbatim transcript. As the Ninth Circuit Court of Appeals pointed out, there is no empirical study to support the Government's assumption that a trial transcript is rarely needed to support a collateral attack. *MacCollom v. United States*, 511 F.2d at 1122 and n.5. *See also* R. Sokol, FEDERAL HABEAS CORPUS, App. E[13] (2d ed. 1969). In such cases, the denial of a transcript bars meaningful access to collateral review and, therefore, under *Boddie*. violates the Constitutional guarantee of due process of law.

[13] The Government relies exclusively on *United States v. Shoaf*, 341 F.2d 832 (4th Cir. 1964) in support of its assumption that trial transcripts are rarely necessary to support collateral attack. The author or *Shoaf*, however, unlike the author of the Ninth Circuit's opinion in *MacCollom*, never served as a federal district court judge and, therefore, had no direct experience with screening federal prisoner petitions pursuant to § 2255.

Ross is distinguishable from MacCollom on numerous grounds. First, of course, *Ross* dealt with the right to counsel in discretionary appeals, which are clearly not required by the federal Constitution. MacCollom, on the other hand, deals with the right to collateral review, which is expressly granted by the federal Constitution. Second, the function and scope of appeal is significantly different than that of collateral review. Although an appellate court is limited to reviewing assertions of error on the face of the record, which may or may not include a verbatim transcript, the federal court reviewing a petition for habeas corpus or a motion to vacate sentence "has the power to receive evidence and try the facts anew." *Kaufman v. United States*, 394 U.S. 217, 224 (1969). *Townsend v. Sain* 372 U.S. 293, 312 (1963). Thus, the court's reasoning in *Ross*, that strict equality is not required on discretionary appeal because such an appeal is far removed from the fact finding process, is clearly inapplicable to collateral review. [It is more like the original itself.]

B. Right to Transcript and Due Process

The most recent case to consider right to transcript under the Due Process Clause of the Fifth Amendment was *Britt v. North Carolina, supra.* In *Britt,* this Court held that access to a transcript on appeal or after a mistrial is established as a matter of law. In *Britt,* it was presumed that an adequate alternative to a transcript was available and, accordingly, due process did not compel production therein. This Court found that North Carolina's interests in preventing frivolous appeals and in conserving state funds outweighed the interests of Britt where an adequate alternative to the transcript existed. *Britt* would obviously have been decided differently had (a) no alternative existed, and/or (b) North Carolina's denial of the transcript was based solely on the failure of Britt to make a showing of need.

Britt is analogous to the situation presented by the instant case. No alternative is available or permitted under 28 U.S.C. 753 (b) which requires a transcript to be kept at trial, and appellant's need is therefore presumed from *Britt, supra.* This is especially true of an indigent federal prisoner who, like MacCollom, was tried and convicted, did not appeal, and then seeks collateral relief. Unlike the petitioner in *Britt,* however, MacCollom does not seek to exercise the non-constitutional right to an appeal. *Ross v. Moffitt,* 417 U.S. 600 (1974); *McKane v. Durston,* 153 U.S. 684 (1894). On the contrary, MacCollom seeks to exercise his right to collateral review, which is expressly guaranteed by the Constitution in Article I, Section 9, Clause 2:

> "The privilege of the Writ of Habeas Corpus shall not be suspended, unless in Cases of Rebellion or Invasion the public safety may require it."

The fact that MacCollom seeks relief under 28 U.S.C. § 2255 rather than by Writ of Habeas Corpus is constitutionally insignificant, for this Court has stated that " 'the sole purpose [of § 2255] was to minimize the difficulties encountered in habeas corpus hearings by affording *the same rights* in another and more convenient forum.' " *Sanders v. United States,* 373 U.S. 1, 13 (1963) (Emphasis in original). Indeed, § 2255 is the "statutorily compelled substitute for habeas corpus." R. Sokol, *The Availability of Transcripts for Federal Prisoners,* 2 Am. Crim. L.Q. 63 (1964). *See also United States v. Hayman,* 342 U.S. 205 (1952); *Hill v. United States,* 368 U.S. 424 (1962); Blackmun, *Allowance of In Forma Pauperis Appeals in Section 2255 and Habeas Corpus Cases,* 43 F.R.D. 343 (1967); R. Sokol, FEDERAL HABEAS CORPUS, 180 (2d ed. 1969); Velman, *Post-Conviction Relief for Federal Prisoners: A Survey and a Suggestion under 28 U.S.C. §2255,* 69 W.Va L. Rev. 277 (1967).

The Government contends that an extension of the due process principles of *Griffin v. Illinois,* 351 U.S. 12, and other transcript cases is unwarranted in light of the Court's decision in *Ross v. Moffitt,* 417 U.S. 600. In *Ross* this Court held that the Equal Protection Clause of the Fourteenth Amendment does not require the state to appoint counsel to assist indigent petitioners in the prosecution of discretionary appeals, because the Constitution does not require absolute equality between indigents and those who can afford to pay. But *Griffin* also stands for the proposition that the Due Process Clause guarantees that the poor will not be denied access to those parts of the criminal justice system integral for determining guilt or innocence of a defendant and *Ross* in no way modifies this. The Court in *Griffin* clearly stated that "to deny adequate review

to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside." 351 U.S. at 19.

The principle that an indigent cannot be denied meaningful access to "adequate [direct] appellate review" solely because of his poverty (*Griffin* at 19) has been applied to direct appeals from collateral proceedings, *Smith v. Bennett* 365 U.S. 708 (1961), and to post-conviction review itself, *Lane v. Brown* 372 U.S. 477 (1963). In *Smith* the bar to access was a statutory filing fee for state habeas corpus relief. In *Lane* the bar to access was a state procedure requiring the filing of a transcript for post-conviction review, but which made transcripts available to indigents only by approval of the public defender. MacCollom contends that without a transcript of his trial he is likewise barred from access to post-conviction review pursuant to 28 U.S.C. § 2255 (1970) since the error he wished to assert can only be found and cited with particularity by access to a verbatim transcript.

In *Boddie v. Connecticut*, 401 U.S. 371 (1971), this Court held that indigent divorce petitioners could not be denied access to the courts by statutorily required court fees. *Boddie* analyzed whether such court fees denied indigent divorce petitioners access and, therefore, due process of law by examining both the extent to which the state monopolized the means for legally dissolving the marital relationships and the fundamental nature of that relationship.[14] This court found that "marriage involves interests of basic importance in our society . . ." and that the court was "not only the

[14] 401 U.S. at 374.

paramount dispute-settlement technique, but, in fact, the only available one." (401 U.S. at 377). The right of the divorce petitioners in *Boddie*, the right of MacCollom, and, indeed, the right of any federal prisoner to post-conviction review equally involves interests of basic importance in our society. The provision of federal post-conviction review recognizes "that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief." *Kaufman v. United States*, 394 U.S. 217, 226, (1969). If the Due Process Clause protects interests of basic importance implicit in the Constitution[15] it must surely protect the right to federal post-conviction review, which is explicitly guaranteed.[16] Thus, the interests of federal prisoners like MacCollom are at least as worthy of protection as the interests of indigent divorce petitioners in *Boddie*, and, therefore, if post-conviction review is the sole means for resolving the "dispute" between such federal prisoners and the Government,

[15] See e.g., *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska* 262 U.S. 390 (1923).

[16] U.S. Constitution Article I, § 9: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it."

statutory barriers to access to such review violate the Due Process Clause.[17]

For MacCollom, post-conviction review is the sole judicial forum for the constitutional claims he asserts. While it is true, as the Government points out, that MacCollom could have appealed his conviction, Brief for Petitioner at 19-23, the fact remains that no appeal was taken.[18] It is precisely because the time for appeal has passed that MacCollom is left with a single avenue of relief, Thus, federal prisoners like MacCollom, who have been convicted after a trial, but who have not appealed, are like the divorce petitioners in *Boddie* because there is only one available forum in which to settle their disputes.[19]

Finally, in *Hardy v. United States* 375 U.S. 277 this Court has applied due process principles and balanced the governmental interests in screening frivolous law suits and conserving funds and found the necessity of a transcript for litigants analogous to MacCollom required. In *Hardy*, the provision of a transcript was required for a criminal appellant without a specific showing of need where new counsel on appeal had been appointed. Hardy's new counsel, as did MacCollom's new counsel, required the transcript in order to process the case and this Court held that no other record could be an adequate alternative for the new counsel on appeal. 375 U.S. 278-281.

In light of these decisions emphasizing the balancing of the governmental interests against the necessity for a transcript, the Government's construction of 28 U.S.C. § 753(f) results in denying MacCollom due process of law.

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[17]Both the *United States v. Kras*, 409 U.S. 434 (1973) and *Ortwein v. Schwab*, 410 U.S. 656 (1973) are readily distinguishable from the instant case. In Kras the Court held that petitioners for voluntary bankruptcy are not denied due process of law by the jurisdictional requirement of a fifty dollar filing fee. The Court pointed out that there is no constitutional right to a discharge in bankruptcy, 409 U.S. at 446, and that bankruptcy is not the exclusive means for readjusting debtor-creditor relations. 409 U.S. at 445-446. In *Ortwein* the Court held that a welfare recipient whose welfare payments were reduced following an agency pretermination evidentiary hearing does not have an absolute right to appellate review of the agency's determination. The Court pointed out that "Even in criminal cases, due process does not require a state to provide an appellate system." (citations omitted) 410 U.S. at 660.

[18]The Government contends that "The failure to assert on direct appeal a claim of total absence of evidence to support a conviction almost certainly would constitute a 'deliberate bypass' (*Kaufman v. United States, supra*, 394 U.S. at 227, n.8.) Brief for Petitioner at 38, n.17. While the Court in *Kaufman* did point out that "the § 2255 court may in a proper case deny relief to a federal prisoner who has deliberately bypassed the orderly federal procedures provided at or before trial and by way of appeal . . . ," 394 U.S. at 227, n.8. The issue of deliberate bypass is properly raised only in opposition to a motion to vacate sentence at the district court level. MacCollom has alleged that he was afforded ineffective assistance of counsel,* and, in the absence of a hearing on the issue, the Government's assertion that MacCollom's failure to appeal "almost certainly" constitutes a deliberate bypass is premature and totally unsupported by the record.

*Appendix at 6.

[19]Indeed the Government position if logically extended would completely reverse the constitutional basis of appeal and Habeas Corpus by resulting in the automatic denial of post-conviction relief where the statutory remedy of appeal was not exercised.

IV.

THE GOVERNMENT'S CONSTRUCTION OF 28 U.S.C. 753(f) DENIES MacCOLLOM HIS FIFTH AMENDMENT RIGHTS TO EQUAL PROTECTION OF THE LAWS.

The case applying equal protection analysis to transcript issues is *Griffin v. Illinois*, 351 U.S. 12 providing transcripts for indigent appellants. Throughout its recent history, this Court has remained dedicated to the principle of equal justice for all criminal defendants set forth in *Griffin*. *See e.g.*, *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Douglas v. California*, 372 U.S. 353 (1963); *Draper v. Washington*, 372 U.S. 487 (1963); *Smith v. Bennett*, 365 U.S. 708 (1961); *Burns v. Ohio*, 360 U.S. 252 (1959). As the Government points out, this court in *Ross v. Moffitt*, 417 U.S. 600 (1974), most recently delineated the scope of the equal protection clause for indigents. *See* Brief for Petitioner at 8-9. *Ross* in applying the *Griffin* standards relied heavily on two factors overlooked by the Government and which are present to much different effect in MacCollom.

The first factor was the lack of any right to a subsequent discretionary appeal or even any appeal at all, citing *McKane v. Durston* 153 U.S. 684, 417 U.S. at 606. Unlike *Ross*, MacCollom has an absolute guarantee of post-conviction relief in Art. I, §9, cl.2. *Ross*'s reliance upon this difference from *Griffin* is accordingly indicative of the necessity for *Griffin* to apply to MacCollom.

The second factor was the prior appeal of right accorded Moffitt which gave to him a complete trial

transcript, court record, brief by his prior attorney and legal advice concerning his discretionary review application from the prior attorney before his withdrawal. In light of these factors, the right to counsel on the second discretionary appeal by Ross could be weighed against the state's interest in preserving its funds and screening cases because adequate materials for Moffitt's pro-se application were in existence. MacCollom, of course, had *none* of these available to him to aid his *first* attempt at review. Moffitt had the "adequate opportunity to present his claims fairly," 417 U.S. 616; MacCollom had not.

Contrary to the Government's Brief (at 7) that the Ninth Circuit or Respondent believe the test for equal protection is "that review must be available to the destitute and wealthy on an absolutely equal basis;" the proper test, applied below (Pet. App. p. 3a, 15a) and asserted here is that indigents "must be afforded as adequate . . . review as defendants who have enough money to buy transcripts," 351 U.S. at 19, (Pet. App. p. 3a). Since MacCollom cannot frame his claim or exercise his Art. I, Sec. 9, cl. 2 right of collateral review without his transcript, equal protection of the laws requires such.

> "While in *Griffin* the transcript could be waived as a convenient but not necessary predicate to court access, here the State invariably imposes the costs as a measure of allocating its judicial resources. Surely, then, the rationale of *Griffin* covers this case." *Boddie* 401 U.S. 377, 381-82.

If prevention of frivolous suits and conservation of financial resources cannot justify filing fees (see *Smith v. Bennett*, 365 U.S. 708) and as Justice Harlan pointed out in Boddie, the transcripts were mandated by *Griffin* even though they were "not necessary," it is impossible

for these same justifications to bar petitioner where he has no alternative to prepare his case because the nature of his grounds of error are those which can only be revealed by the verbatim transcript (insufficiency of evidence and ineffective assistance of counsel).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

COLIN F. MACCOLLOM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
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1. Respondent argues (Br. 13-14) that "[c]entral to the Government's position is the assertion that post-conviction relief is secondary, both constitutionally and in importance to the opportunity for direct appeal." He contends that our position denigrates the important role of collateral attack in redressing violations of the Constitution. Our reliance on the availability of a transcript to those who take direct appeal is particularly inappropriate, he asserts, because there is no constitutional right to appeal, whereas the Constitution provides that the privilege of the writ of *habeas corpus* shall not be suspended except in cases of rebellion or invasion (Article I, Section 9, Clause 2).

Our brief, however, does not analyze the difference between direct appeal and collateral attack in terms of their relative "importance." We contend that collateral review plays a limited role only in the sense that it

is designed to test "the very gravest of allegations" of error. *Kaufman* v. *United States*, 394 U.S. 217, 223-224. Such a limitation scarcely deprecates the importance of *habeas corpus* but, on the contrary, underscores its unique historical function.

We do not argue that respondent "bypassed" his right to collateral relief by not taking a direct appeal. What respondent bypassed by not appealing was a relatively simple means of access to a tool that would help him to investigate the details of his trial. He bypassed not the right to collateral relief, but the right to obtain a transcript without showing the need for one and without showing possible merit to his claim that the Constitution has been violated. Congress has established alternative means of obtaining a transcript: respondent has bypassed one of those means and now is confined to the other. Respondent's constitutional attack is based on the premise that Section 753(f) must be viewed in isolation, as if Congress never had established the alternative method of access to a transcript. But, of course, Congress did establish alternative routes, even though it was not constitutionally compelled to do so, and this Court must examine the operation of the entire program. That program, we submit, offers indigents a fair opportunity to have all of their claims adjudicated. To the extent Section 753(f) imposes additional requirements upon indigents who do not appeal, Congress was empowered to conclude that the requirements are justified both by the special nature of collateral review and by the imperatives of sound judicial administration.[1]

[1]We collected in our brief a number of cases so holding. A recent commentary critical of the decision below has collected additional cases supporting our position. See Note, *The Scope of the Indigent Federal Prisoner's Rights to a Trial Transcript—*

2. Respondent contends (Br. 6, 18-25) that the need and lack-of-frivolity requirements of Section 753(f) effectively suspend the writ of *habeas corpus*. This argument apparently has two components: (a) that an applicant for relief under 28 U.S.C. 2255 is treated less favorably than is an applicant for a writ of *habeas corpus;* and (b) that respondent will be unable to secure collateral relief unless he can obtain a transcript of his trial. We submit that the first argument is inaccurate as a matter of fact and that the second argument misperceives the meaning of Article I, Section 9, Clause 2, of the Constitution.

a. Respondent argues that under Section 753(f) a petitioner for a writ of *habeas corpus* challenging a state conviction receives a trial transcript as a matter of course, while a federal convict applying pursuant to Section 2255 must demonstrate a particularized need for a transcript. This difference, he contends, amounts to a "suspension" of the privilege of *habeas corpus* as to the latter group. The premise of this argument is, however, incorrect.

It is true that Section 753(f) does not, in terms, require a particularized showing of need in *habeas corpus* cases. We have adverted to this apparent disparity of treatment at pages 32-33, n.21, of our brief. We agree with Mr. Justice Blackmun's observation that Congress, in including language in the 1965 amendment of Section 753(f) requiring a showing of particularized need for a transcript in Section 2255 proceedings,

MacCollom v. *United States*, 7 Conn. L. Rev. 479, 490-492, n. 74 (1975). See also *United States ex rel. Buford* v. *Henderson*, 524 F.2d 147 (C.A. 2) (there is no constitutional need to provide an indigent with a trial transcript to comb for errors if he had access to a transcript on appeal). Cf. *Britt* v. *McKenney*, C.A. 1, No. 75-1279, decided January 23, 1976 (there is no constitutional need to provide an indigent with a transcript of a post-arrest probable cause hearing; *Commonwealth* v. *Britt*, 285 N.E.2d 780 (Mass.), endorsed).

apparently gave little consideration to the fact that the existing statute did not contain an identical requirement in the case of *habeas corpus*.[2] Blackmun, *Allowance of In Forma Pauperis Appeals in §2255 and Habeas Corpus Cases*, 43 F.R.D. 343, 356-357 (1967). The reason for this, however, is apparent from the legislative background: the 1965 amendment was designed to answer the question (as to which the circuits were divided) whether the courts had any power to order transcripts at public expense in Section 2255 proceedings. At the time Congress acted there was unanimous agreement among the federal courts that the provision of a verbatim transcript could be conditioned upon a showing of particular need in *habeas corpus* proceedings, and such has continued to be the view of the courts.[3] In light of that agreement, Congress' inclusion of language requiring an identical showing with regard to the provision of a transcript for use in a Section 2255 motion was simply "a legislative recognition of the [judicial] practice in dealing with the other kinds of proceedings."[4] *Benthiem* v. *United States*,

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[2]Prior to 1948 no statute required the stenographic recording of proceedings in any federal case, civil or criminal. *Miller* v. *United States*, 317 U.S. 192, 197. 28 U.S.C. 753 was enacted in 1948 to create a system of official salaried reporters and to provide, *inter alia*, that all proceedings in criminal cases had in open court would be recorded. Section 753(f) gave the courts explicit power to order transcripts in criminal and *habeas corpus* cases, but, until 1965, the statute was silent on whether they could do so in connection with Section 2255 motions.

[3]See the cases collected in the second paragraph of note 6, page 13, of our opening brief.

[4]The 1965 amendment to Section 753(f) adopted verbatim a draft originally proposed by the Judicial Conference of the United States. See *1961 Proceedings of the Judicial Conference of the United States* 100.

403 F.2d 1009, 1011 (C.A. 1). See *Ketcherside* v. *United States*, 317 F.2d 807, 808 (C.A. 6); *United States* v. *Hoskins*, 85 F. Supp. 313, 314 (E.D. Ky.); *United States* v. *Lawler*, 172 F. Supp. 602, 605 (S.D. Tex.). Because, to our knowledge, no court has held that a verbatim trial transcript must be furnished to a prisoner on demand in a *habeas corpus* case, Section 753(f) does not discriminate between Section 2255 and *habeas corpus* proceedings and cannot "suspend" the availability of *habeas corpus* to federal prisoners.

b. It may be accurate for respondent to contend that without a transcript he cannot reasonably expect to obtain collateral relief.[5] But this does not indicate that the privilege of *habeas corpus* has been suspended. The privilege secured by Article I, Section 9, Clause 2, is not a guarantee of success; the Constitution simply secures to those in custody the privilege as it was known in England when the Constitution was adopted and as it has developed at common law. *Ex parte Bollman*, 4 Cranch 75, 93-94; *Ex parte Watkins*, 3 Pet. 193; *Stidham* v. *Swope*, 82 F. Supp. 931 (D. Cal.). The privilege has never, either at common law or by statute, included an unconditional right to a free verbatim trial transcript. Consequently, Congress did not "suspend" the privilege by declining to alleviate respondent's difficulties in making the showings that have always been necessary either to obtain a transcript or to obtain collateral relief. Cf. *United States* v. *Hayman*, 342 U.S. 205.

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[5]Of course, it is far from clear that a transcript would be of any use to respondent, who saw so little prospect of being successful on appeal that he bypassed appeal in favor of an immediate motion in the district court to reduce sentence (Resp. Br. 3). (We are willing to accept *arguendo* the assertions of fact made at Resp. Br. 3-4. We observe, however, that a number of those assertions are *dehors* the record.)

3. If respondent were correct that the Constitution requires the government unconditionally to provide him with a transcript of his trial for use in preparing a motion for collateral relief, it would seem to follow that the Constitution requires the provision of other legal services, such as appointment of counsel, as well. It is but a short logical step from respondent's argument that he cannot frame his claim "effectively" without a transcript to a prisoner's claim that he cannot do so (with or without a transcript) unless he has the assistance of counsel. Indeed, under respondent's reasoning (*e.g.*, Br. 14, 36) the right to appointed counsel would be even more "absolute" on collateral attack than it is now on direct appeal, since there is no constitutionally guaranteed right to appeal. Yet the courts of appeals without exception have held that an indigent has no absolute right to counsel for purposes of collateral review.[6] Section 753(f) merely establishes the same

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[6]See, *e.g.*, *Vandenades* v. *United States*, 523 F.2d 1220 (C.A. 5); *United States* v. *Masters*, 484 F.2d 1251, 1253 (C.A. 10); *United States ex rel. Johnson* v. *People of the State of Illinois*, 469 F.2d 1297, 1300 (C.A. 7), certiorari denied *sub nom. Johnson* v. *Illinois*, 411 U.S. 920; *Eaton* v. *United States*, 437 F. 2d 362, 363 (C.A. 9), certiorari denied, 402 U.S. 931; *Tweedy* v. *United States*, 435 F.2d 702, 703 (C.A. 8); *Aubut* v. *Maine*, 431 F.2d 688 (C.A. 1); *Tucker* v. *United States*, 427 F.2d 615, 617-618 (C.A. D.C.); *United States ex rel. Gordon* v. *Reincke*, 415 F.2d 1126, 1128 (C.A. 2); *United States ex rel. Worlow* v. *Pate*, 411 F.2d 972 (C.A. 7), certiorari denied *sub nom. Lane* v. *Pate*, 403 U.S. 921; *United States* v. *Brierley*, 392 F.2d 197, 198 (C.A. 3), certiorari denied *sub nom. Manning* v. *Brierley*, 393 U.S. 882; *Queor* v. *Lee*, 382 F.2d 1017 (C.A. 5); *Douglas* v. *Maxwell*, 357 F.2d 320 (C.A. 6), certiorari denied, 385 U.S. 858; *Crowe* v. *United States*, 175 F.2d 799, 801 (C.A. 4), certiorari denied, 338 U.S. 950. Cf. *Coppedge* v. *United States*, 369 U.S. 438; *Johnson* v. *Avery*, 393 U.S. 483, 488 ("It has not been held that there is any general obligation of the courts, state or federal, to appoint counsel for prisoners who indicate, without more, that they wish to seek post-conviction relief.").

standard in regard to transcripts that all eleven courts of appeals consistently have applied in determining whether to appoint counsel in collateral proceedings.

For these reasons, in addition to the reasons set out in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

ROBERT H. BORK,
Solicitor General.

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